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R E P O R T S

O F

C A S E S

ARGUED AND DETERMINED

In the High Court of Chancery,

IN THE TIME OF,

Lord Chancellor HARDWICK E.

BY

JOHN TRACY ATKYNS,

Of LINCOLN'S INN, Esq.

CURSITOR BARON OF THE EXCHEQUER.

The THIRD EDITION, revised and corrected ;
With NOTES, and REFERENCES to FORMER and MODERN
DETERMINATIONS, and to the REGISTER'S BOOKS,

By FRANCIS WILLIAMS SANDERS,
Of LINCOLN'S INN, Esq.

Author of AN ESSAY ON THE LAW OF USES AND TRUSTS.

IN THREE VOLUMES.

VOL. II.

L O N D O N :

PRINTED BY A. STRAHAN AND W. WOODFALL,
LAW-PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY ;

FOR E. AND R. BROOKE, J. BUTTERWORTH, T. CADELL AND W. DAVIS
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S. HAYES, W. RICHARDSON, AND OGILVY AND SPEARE.

1754.



THE P R E F A C E.

It may not be improper to acquaint the publick with my reasons for dropping the plan I set out with, in my first volume, of ranging the cases under their particular heads of equity, in an alphabetical series: in the first place, the benefit resulting from it, is by no means equivalent to the immense labour and trouble it requires to reduce them to such an order; and in the next I have been informed, that some of the most eminent practisers of the law have expressed their disapprobation of it, and concur with me, in thinking it did by no means answer my intention, considering the length of time it necessarily took up to methodize them in this manner.

It cannot be supposed that gentlemen who are in business can find leisure to read a work regularly through, as a digest or system of equity, and therefore, instead of pursuing this scheme, I have taken care to make a very large and copious table of principal matters, which I flatter myself will effectually supply the place of it; and that each case will be so fully and clearly abstracted in this table, together with the points that may arise in it, that it may easily be cited from thence, if the person who has immediate occasion for it, should not have time to read it at large in the body of the work.

The cases in my second and third volumes following in a succession of time, according to the respective years in which they were heard, have enabled me to send them much sooner to the press, and to answer the demand of the public for the
Vol. II. A 2 remainder

remainder of these reports; for, as my booksellers have informed me, great numbers of the profession have declared they will not purchase the first volume, till they see the whole work is complete, which with the other reasons assigned, I apprehend will sufficiently justify me in laying my original plan intirely aside.

To prevent mistakes, with regard to the state of a case, or the decree, I have been at the trouble and expence of comparing my notes with the register, and have, in those instances where I thought it was necessary, taken the state of the case from thence, and in some of the most material, have given the substance of the decree, which I imagine must naturally reflect light upon the cases themselves; but it has not always been in my power to do this, for where the court have been of opinion to dismiss the plaintiff's bill, the register has only made a minute of the dismissal, and the case at large has not been entered in the report office, the parties in the suit not chusing to be at the expence of it.

In answer to the objection that may be made to my setting forth sometimes the declarations of Lord *Hardwicke*, and his decrees so much at large, I hope it is sufficient to say, that if it is an error, it is more excusable than to add at the end of the case, which frequently occurs in other books of reports, *and so the court decreed accordingly*, or words of the like import; for it is very obvious that such a loose and general expression must shut out a very considerable light, which would naturally have elucidated the case itself, if such parts of the decrees had been taken from the register, as do essentially relate to the points made in the cause.

I am aware too, another objection may be made to cases of practice occurring so frequently in the course

course of this work; but I hope the eminent practitioners of the law will please to remember, what difficulties they had to encounter at their first setting out in the profession, and pardon me for inserting these cases, which are published merely for the edification and instruction of students and young counsel, who, for want of a guide to conduct them in their long and tedious journey through *Westminster-hall*, often wander out of the way, and are some time, at least, lost and bewildered in the labyrinths of the law, before they are able to get into the right road.

Where a case is very long, from the number of particulars it consists of, I have thought it more adviseable to give the abstract of it in the Table of Principal Matters, rather than run out the marginal notes to an immoderate length, especially as they must necessarily be in a smaller character than the body of the work, and strain the eyes more in reading them.

I think it incumbent on me to take notice, why I have not troubled the judges with an application for their *imprimatur*: they could not, from their situation, be supposed to examine the manuscript with any accuracy before it was printed; and therefore to solicit them to give the sanction of their names to a performance with which they were entirely unacquainted, in my opinion, would have been paying their lordships a very ill compliment; and however flattering the approbation of the Great Men of the Law, who now so eminently adorn the courts of justice, might be to the author, and whatever weight and authority it might have given to this work, or honour it might have reflected upon it, I chose rather, after a complete and candid examination of these reports, they should either rise or fall in the esteem of the public, according to their real and intrinsic merit only.

I take the liberty of mentioning, for the sake of those gentlemen whose practice lies chiefly in the courts of common law, that during the time Lord *Hardwicke* presided in Chancery, several very material points of law, which incidentally arose in some of these cases, were determined by him with the utmost precision, and in a very masterly manner.

A very ingenious friend of mine having furnished me with Lord *Hardwicke's* argument in *Middleton and Crofts*, when he delivered the opinion of the court of King's Bench in that case, I have added it at the end of this volume by way of appendix.

In Sir *John Strange's* Reports, there is only a short sketch, or rather the outlines of his Lordship's argument; and as I have been enabled to give it to the public at large, flatter myself it will sufficiently plead my excuse for introducing it here.

No care or pains have been wanting to make this work complete; and I am persuaded, from the known candour and humanity of the professors of the law, that they will have the goodness to overlook any failings or imperfections

————— *Quas aut Incuria fudit,*
Aut humana parum cavit Natura. ———

Before I conclude, permit me to add, that I shall think myself peculiarly happy, if I have, in some measure, at least, done justice to the determinations of the Great Man whose name is prefixed to this work, and who, whilst he lived, was an ornament of the present, and will be a most illustrious pattern to all succeeding ages.

A T A B L E

A T A B L E O F T H E N A M E S o f t h e C A S E S ;

Alphabetically disposed, in such an Order, as that the Cases may be found
by the Names either of the Plaintiffs or Defendants.

N. B. Where *versus* follows the first Name, it is that of the Plaintiff; where
and, it is the Name of the Defendant.

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A S E S

AND DETERMINED IN THE TIME OF

ANCELLOR HARDWICKE.

*Stemdale. Haubinson
1. Simon. 393.*

Seals after Hilary Term, 1736. Anon'. Case 1.

DWICKE said, that a bill, tho' depending almost six years, was not allowed to be such a debt out of the statute of limitations; yll, in a case before him at the Rolls, declared the same opinion (1).

A bill depending six years in Chancery, not sufficient to take a debt out of the statute of limitations.

Marsh. 1 Cha. Rep. ante 1 vol. 282. Sturt v. Mellish, post. Calladon, ibid. 214. 615. Contra. anon. 1 Vern. 73. 17. Lake v. Hayer,

Sumner v. Thorpe.

Case 2.

It is brought for a general account, and the acts forth a stated one, the plaintiff must only the costs of the day.

Where there is a plea of a stated account to a bill brought for a general one, the plaintiff must amend.

It is strictly adhered to in this court, than, sets forth a stated account, he shall not have a general one, because very often a general one is a perplexed affair, which might be dark, if left to a general one.

Dawson v. Dawson, note 1.

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C A S E S

ARGUED AND DETERMINED IN THE TIME OF

LORD CHANCELLOR HARDWICKE.

Between the Seals after *Hilary* Term, 1736. Anon'.

Mandate. Hutchinson
1. Sinner. 393.
Case 1.

LORD HARDWICKE said, that a bill, tho' depending in Chancery almost six years, was not allowed to be such a demand, as to take a debt out of the statute of limitations; and Sir *Joseph Jekyll*, in a case before him at the Rolls, declared himself to be of the same opinion (1).

A bill depending six years in Chancery, not sufficient to take a debt out of the statute of limitations.

(1) *Craddock v. Marsh.* 1 *Cha. Rep.* ante 1 vol. 282. *Sturt v. Mellish*, post. 205. *Hardret v. Calladen*, ibid. 214. 615. *Contra. anon.* 1 *Vern.* 73. *Am. 2 Cha. Ca.* 217. *Lake v. Hayer*,

Sumner v. Thorpe.

Case 2.

WHERE a bill is brought for a general account, and the defendant sets forth a stated one, the plaintiff must amend (1), but pays only the costs of the day.

Where there is a plea of a stated account to a bill brought for a general one, the plaintiff must amend.

There is no rule more strictly adhered to in this court, than, that when the defendant sets forth a stated account, he shall not be obliged to go on upon a general one, because very often a stated account would unravel a perplexed affair, which might otherwise remain in the dark, if left to a general one.

(1) See ante 1 vol. 1. *Dawson v. Dawson*, note 1.

Ex parte Rook.

[2]
Case 3.

LORD Hardwicke said, the power of the Court of Chancery, as to justices of the peace, extends only to the putting them in commission; but after they are once in the com-

The power of this court over justices of peace, is confined merely to the putting

them in commission, and cannot punish them for mal-behaviour, which is the province of the King's Bench only.

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mission

Ex parte
Rook.

mission of the peace, this court has no right to punish them for any mal-behaviour; the only redress is to move the Court of King's Bench for an information, and afterwards the complainants may apply to this court, to turn them out of the commission; and his Lordship therefore dismissed the petition.

Case 4.

Anonymous, Easter Term, 1737.

A order for a cause to stand over indefinitely, implies not 'tis put off to the next term.

LORD *Hardwicke* said, where there has been an order that a cause should stand over indefinitely; it does not imply that the cause is put off only to the next term.

Case 5.

Davy v. Barker.

A mortgagee, till he is fully satisfied, is not obliged to quit the possession to a purchaser.

THIS Court will not allow a purchaser to oblige a mortgagee in possession to quit the estate to the purchaser, unless he will first pay him principal, interest and costs.

Case 6.

Cook v. Martyn.

Wage & Fare
6. Nov. 32.

Curry & Wills

1. Nov. 4. 1732

150.

Wick & Bates

2. Dec. 4. 1732

ON the 16th of September, 1725, *John Martyn* made his will, in which he says, "I give all my *South-sea* bonds, &c. in trust, that my executrix shall pay unto my son *John Martyn*, the sum of fifty pounds *per annum*." And then gives a legacy of 100*l.* to a niece, and several other pecuniary legacies, all which I direct to be paid within six months after my wife shall have made a final end of an affair depending with relation to a particular estate; and gives all the residue of his estate to his wife, and makes her sole executrix.

The question upon this will is, Whether these are specifick or general legacies? Mr. Attorney General, counsel for the executrix, argued, that if there is a sufficient fund, the legatees are intitled to payment, and if not sufficient, so far as it goes; for if a particular fund falls short, a specifick legatee must abate in proportion with other legatees, and not be reimbursed out of the general assets.

The executrix, in her answer to a bill brought by one of the specifick legatees, allows the fund was sufficient to satisfy the specifick legacies, but could not set forth what was the exact amount of the *South-sea* bonds, &c.

It appeared in proof, that the legacies came to 2495*l.* over and above the fifty pounds *per ann.* and the *South-sea* bonds, &c. amounted to 2220*l.* principal.

LORD CHANCELLOR,

As the fund proves insufficient to pay the legacies, is it not the same case, as if the testator had said, I give such a sum out of an estate I am intitled to? But if the particular estate falls

falls short of his expectations, will any body say, they shall not be paid out of the general assets (1) ?

COOK v.
MARTYN

The payment within six months is no more than a direction for the payment of the specifick legacies, and does not make any alteration as to the fund.

The executrix, by her answer, confesses that she hath *South-sea* bonds, *South-sea* annuities, and other assets, sufficient to satisfy all the legacies, which is putting the same construction as is now contended for by the plaintiffs; and tho' no confession of law can possibly hurt the party, unless the fact be right, yet it would be absurd, as the very fund the testator had then in contemplation, was not equal to satisfy the legacies and annuity, if I was not to extend them to the other part of the personal estate, especially where there is a residue allowed (2) by the executrix in her answer, after all debts and legacies are satisfied.

Praying general relief is sufficient, tho' the plaintiff should not be more explicit in the prayer of the bill; and Mr. *Robins*, a very eminent counsel, used to say, general relief was the best prayer next to the Lord's prayer (3).

Praying general relief in a bill is sufficient.

The admission of assets by the executrix to one legatee, is an admission to all.

Admission of assets to one, admission to all.

But as in this case, general relief is prayed in one part of the bill, and particular relief in another, it must stand over to be amended, upon paying the costs of the day.

Where general relief is prayed in one part, and particular in another, the bill must stand over to be amended.

must stand over to be amended.

(1) See *Purfe v. Snaplin*, ante 1 vol. 414.

(2) See ante 1 vol. 629, 630.

(3) See *post. Grimes v. Finch*, 141.

Warner and others, executors of Edward Hankin, deceased, } Plaintiffs.

[4]
Case 7.

Watkins and Villiers, assignees of Ezekiel Woolley, a bankrupt, } Defendants.

THE bill was brought in order to have an account of the transactions between *Woolley* and *Hankin*, and to be admitted as creditors to a proportionable share of the dividends under the commission of bankruptcy against *Ezekiel Woolley*.

On the 25th of February, 1717, *Woolley* borrowed 500*l.* of *Hankin* on bottomree, and agreed to pay 26*l.* per cent. which he secured on bills of sale and bills of parcel of the cargo of a ship belonging to him; and the principal was to be discharged, when the remittances from the ship and produce were sold; and after the return of the ship, till such sale was completed, only 5*l.* per cent. interest was to be paid by the borrower. *Woolley* executed a bond in the penalty of 1000*l.* for performance of covenants, and the lender was to chuse the goods on which the risque was to be run; there was a proviso, that if the wholegoods were lost, then the principal was to sink intirely,

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WATKINS.

intirely, or, if only a part of them, then to abate proportionably: other cargoes were sent exactly upon the same terms, and the same stipulations.

In 1722, Mr. *Woolley* became a bankrupt; his assignees insisted this was a very unreasonable agreement, and ought not to be carried into execution; that the covenants were very unusual ones, and the interest very exorbitant, especially as *Hankin* was to have 5*l. per cent.* on the goods after they were actually come home, and therefore they insisted they have done right, in refusing to admit the executors of *Hankin* as creditors, as they have ordered a sum to be retained to satisfy the demand, if they should be eventually intitled to it.

Mr. *Brown* for the plaintiffs, in order to shew it was a reasonable contract, argued that it must not be considered as a case of *common interest*, because this is a casualty, where the principal is risked and may be lost; and that he did not remember any instance, where the statutes of usury have been applied to a case of this nature.

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The voyage to the *West Indies*, where this ship was bound, is a more dangerous one than any other; and besides there is a very great hazard of the sugars being very considerably damaged by the sea washing away a great part of it.

Though goods are lost in bottomree contracts, yet if the bottom of the ship come home, the contractor here is liable to make them good.

In common cases the bottomree interest is paid, till the whole remittances and produce are sold, though the ship be returned, but here, as soon as the ship arrives in the harbour, the bottomree interest was to cease, and only common interest to commence, and we have it in proof that *Woolley* paid 30 *per cent.* on bottomree to others.

Mr. *Owen*, of the same side, said, the risque here was double, for it was run upon the goods that were sent out, and likewise upon the goods that were to be remitted.

That common bottomree agreements run for a certain time, as suppose for *eight months*, though the ship return in *six months*, and though the principal be paid to the lender, yet the 26 *per cent.* still goes on, till the *eight months* are expired.

LORD CHANCELLOR,

I do not at all wonder that *Woolley* is broke, and then turning to Mr. Attorney General said, do you insist for the assignees under the commission of bankruptcy that this is an usurious contract? for if you can make it doubtful, whether it is usury or not? I will direct an issue to try it at law.

Mr. Attorney General for the defendants, insisted, every contingent contract is not usurious, but its circumstances must clear it from usury.

One hundred and seventy-nine pounds *Hankin* actually received, and 500*l.* 19*s.* 4*d.* was all the produce from 900*l.* worth of goods carried out.

The contract seems to be quite of a new nature, for the counsel of the other side do not pretend to shew any instance of such an agreement.

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WATKINS.

They endeavoured to compare it to the case of a bottomree bond; if it was really so, I would not dispute the point with them, because in that case, the custom of merchants has made it a reasonable and proper contract.

There is no hazard at all run here by any loss which might issue from the insolvency of a factor, for if that had been the case, the 26 *per cent.* does not cease, but *Hankin* is still intitled to have it continued till the principal is satisfied.

The goods returned, whether of sufficient worth or not, were to satisfy fully the money lent at 26 *per cent.* and the fact was, they fell short in value; and if *Woolley* had not been a bankrupt, he must have paid the 26 *per cent.* to this day.

Therefore the terms of this contract are upon the face of it unreasonable.

There is a time too when there is no hazard run, and yet the lender shall have his 26 *per cent.* notwithstanding: besides too, the time is uncertain when the contract shall end.

By the common form of bottomree bonds, your Lordship will see what merchants think a reasonable contingent security.

If the ship return in a stipulated number of months, as in the case of an *East-India* voyage, in 36 months, and in the case of a *West-India* voyage, in 16 months, the contract may possibly run at 26 *per cent.* for the 36 months, but then it cannot possibly be extended any further, but ought to be confined to so many of the 36 months as are run out before the ship arrives.

Here the risque is run during the whole time the ship is in port, as well as out of port: and, in the present case, the lender runs no risque if the goods are lost, for there is a proviso in the present agreement, that unless Mr. *Hankin* receives notice on what ship these goods are put on board, so as he may insure them, that if they are lost, the borrower shall not benefit by it.

In this case here was no risque run upon the loss of the ship; but in the common case, though the goods are saved, and the ship lost, the lender must suffer.

LORD CHANCELLOR,

Mr. Attorney General, will you agree to allow the executors of Mr. *Hankin*, upon the contract, interest at 26 *per cent.* during all the time, except when the goods were upon land?

Mr. Attorney General, on behalf of his clients, desired time to consult them as to this proposal: Lord *Hardwicke* said, I tell you before-hand, I will not carry this contract one jot further than I am compelled to do by the strict rules of this court; and, in the mean time adjourned it to the first day of causes in the next term.

In *Trinity* term 1737, the cause came on again, when Lord *Hardwicke* was pleased to order, that it be referred to Master *Edwards* to take an account of what is due from *Ezekiel Woolley*, the bankrupt, to the plaintiffs, the executors of *Edward Hankin*, on the several contracts; and in taking the account, the Master was directed to allow the plaintiffs 26 *per cent.* for the sums lent in respect of the risque of the goods mentioned in

WARNER v.
WATKINS.

the contracts, during the voyages outward and homeward; and as to the homeward bound voyages, the 26 *per cent.* is to be computed only in proportion to the value of the goods remitted in such voyages; and at the rate of 5 *per cent.* only for the rest of the time mentioned in the contracts, during which any allowance of interest was thereby agreed to be made down to the time of the bankruptcy of *Ezekiel Woolley*: and the Master is also to take an account of what the plaintiffs or *Edward Hankin* received in money or goods towards the said principal and interest, which is to be applied first to sink the interest and then the principal; and for so much as shall be found due to the plaintiffs on this account they are to be admitted as creditors under the commission of bankruptcy against *Woolley*, and to receive a satisfaction for the same, in proportion to the rest of his creditors (1).

An assignee of a bankrupt cannot compound a debt, without a previous meeting of the creditors.

N. B. Lord *Hardwicke* said, in the case of *Warner and Watkins*, an assignee under a commission of bankruptcy cannot make any composition of a debt due to the estate of the bankrupt, though recommended by the Court, without a previous meeting of the creditors for their concurrence, in consequence of an advertisement in the *Gazette* for that purpose (2).

(1) *Reg. Lib. B.* 1736. fol. 524. (2) See 5 *Geo. 2. c.* 30. f. 35.

[8]
Case 8.

George Malden and Mary his Wife, Thomas Cowper and Sarah his Wife, and Walter Warburton, and Ann his Wife. } Plaintiffs.

Littleton Pointz Menill, Richard Harper, Executor of Samuel Allen's Will, Ann Burdet, the Representative of a surviving Trustee, John Minors and Henry Scott, Executors of Samuel Allen. } Defendants.

THE case arose upon the following settlement made upon the marriage of *John Allen*, and *Esther Stevenson*, his wife.

Where a purchaser has given a full value for an estate, the mistake or ignorance of some of the parties to a conveyance, of their claim under a marriage settlement, shall not turn to the prejudice of a fair purchaser (1).

"The first limitation was to *John Allen*, for life, remainder
"to *Esther*, his wife, for life; then to the use of — *Burdet*
"for a term of years; then to the use of the first and every
"other son of the marriage in tail male, and in case there shall
"be no issue male of the said *John Allen*, on the body of the
"said *Esther Stevenson* begotten, at the time of the decease of
"the said *John Allen*, or of the said *Esther Stevenson*, which
"shall first happen, or in *ventre sa mere*, and in due form born
"after the death of the said *John Allen*; or in case the issue
"male between them lawfully begotten shall all of them die
"without issue male, and that there shall be a failure of issue
"male of the body of the said *John Allen*, on the body of the

(1) So if a releasing party be apprized of his right, an inadequate consideration will not avoid the deed. *Stevens v. Lord Bateman*, 1 *Bro. Cha. Rep.* 22. See *Can v. Can*, 1 *P. W.* 727.

"said

"said *Esther Stevenson* begotten, and that there shall be at the
"time of such failure of issue female, one or more daughter or
"daughters between them the said *John Allen* and *Esther Stevenson*
"begotten, living at the time of the said *John Allen's* decease,
"or of the said *Esther*, which of them shall first happen, or
"born alive in due form after the death of the said *John Allen*;
"that then the trustees, or the survivor of them, or the execu-
"tors, &c. of such survivor, shall, by and out of the rents and
"profits so to them as aforesaid limited for the several terms of
"600 and 590 years, raise and levy, receive and pay, as to and
"for the portion of such daughter and daughters, the several
"sums hereafter mentioned; if one daughter the sum of 3000 *l.*
"if two or more 4000 *l.* equally to be divided amongst them, to
"be paid at their several respective ages of twenty-one, if the
"same can be so soon raised and paid; but if not, then the same
"to be paid so soon as it can be raised; and in the mean time,
"for their support and maintenance, interest at the rate of
"5 per cent. per ann. by half yearly payments."

There was a power of revocation, except as to the lands in
jointure, and which were settled to the uses of that marriage,
which revocation was afterwards executed as to the uses upon
all the lands except the jointure.

[9]

John Allen died, and left a widow and four children, a son,
named *Samuel Allen*, and three daughters.

Upon an agreement between the mother and the son, she joins
with him in a recovery, in order to make a title to Mr. *Menill*,
a purchaser of the estate of his late father *John Allen*.

After the contract *Menill* flies off, and refuses to perform the
articles; but *Samuel Allen* obtained a decree against *Menill* for
a performance of the articles of the 19th of February, 1732.
Menill did not even then think fit to perform the contract, till
May, 1733, when *Esther Allen* died, which made it an estate in
possession instead of reversion.

It was afterwards agreed between *Samuel Allen* and *Menill*,
that he should have the estate, and it being pretended that the
mother's, *Esther Allen's*, bargain and sale, in order to make a
tenant to the *præcipe*, was never inrolled, and therefore void,
Samuel Allen suffered a new recovery, and then conveyed the
estate to *Menill*. 982 *l.* was the consideration of the mother's
executing the agreement; but *Menill* insists, that the bargain and
sale not being inrolled, she has not performed her part, and there-
fore void.

He also insisted, that the plaintiffs having agreed to give up
their right to the sum of 4000 *l.* in the articles between the mo-
ther and the son, in order to enable *Samuel Allen* to bar the re-
mainders over, 509 *l.* was paid to her for her own share as con-
sideration money, and 200 *l.* likewise paid to her for rent, un-
justly received by the son.

John Stevenson, (the father in law of *John Allen*, to whom
John Allen had conveyed the estate, which by the power of re-
vocation he might dispose of) made his will, and devised the said
estate to trustees in trust to raise for his three granddaughters the

MALDEN v. MENILL. full sum of 400*l.* to be paid to each at their full age of twenty-one years, and if any of them die, their share to go to the surviving sister.

The articles between *Samuel Allen*, and *Esther Allen* the mother, and the three sisters, were made to secure to *Esther* the sum of 200*l.* to *Mary Allen* 100*l.* and to secure likewise to *Esther* 590*l.* to be divided equally between the daughters; a clause at the end of the articles, by way of general release of all the parties. Upon *Samuel Allen*'s performing his covenants, *Esther* was to deliver up all deeds whatsoever, her jointure excepted.

[10]

The articles entered into with *Mr. Menill* were an absolute conveyance of a reversion in fee, free from all incumbrances, except the jointure of *Esther* the mother of *Samuel Allen*, in consideration of 74,899*l.* 15*s.* 0*d.* the purchase money: there was a covenant of warranty from *Samuel Allen*, against all incumbrances done by him or his ancestors; in the schedule of incumbrances, the very first mentioned are the two terms, one of 600 and the other of 490 created by *John Allen* in the settlement; the second of which was for raising 4000*l.* for his daughters.

The decree of the Court of Chancery was, that *Menill* should perform the articles, and that the conveyance already executed should be delivered to *Menill*, and not that a new conveyance should be prepared.

Mrs. Esther Allen died in 1733, then *Menill*, who hung off before, was very eager to perform his part.

Samuel died in June 1734.

The bill is brought in order to have the sum of 4000*l.* raised by the representative of the surviving trustees, and paid to the daughters, and also for the sum of 992*l.* they are intitled to under the articles between *Samuel* and *Esther Allen*.

Mr. Wilbraham, counsel for the plaintiffs.

I hope your Lordship will be clear that the daughters of *John Allen* are intitled to the 4000*l.* unless they have done some subsequent act to bar them.

It has been insisted, that, unless the daughters have released the 4000*l.* there was no consideration for the 992*l.* paid to *Esther* under the articles.

He cited the case of *Moor v. Mayhew* 1 *Ch. Caf.* 34. where paying part of the purchase-money after he had expressly, upon his own shewing, notice of a deed of lease and release, it was held, that he shall be presumed to have had notice *ab initio*.

Where there were other dealings between *Samuel* and *Esther*, and other controversies, the release shall not be extended to any other transaction besides the articles themselves in favour of a purchaser with notice; and for this purpose he cited *Bovy contra Smith* and *Bovy*, 2 *Ch. Caf.* 124. "There the plaintiff had given a distinct release, before the purchase made of all actions real and personal, and yet there was no occasion proved, why that release should be made, nor any alledged, and there were other dealings between them, and therefore were presumed not

" to

"to relate to this matter, and so the decree passed for the plaintiff."

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Mr. *Brown*, counsel for Mr. *Menill*, said, the cross bill is brought to have an assignment of the two terms from the sisters of *Samuel Allen* delivered over to Mr. *Menill* to secure his purchase.

The estate on which there was a limitation to the daughters was sold for so small a sum as 1500 *l*.

The objection started by the plaintiff was never made till some of the purchase-money was paid, nor even till the assignment of these very terms was drawn and ingrossed, and upon the very brink of being executed by them.

The release is drawn in as full, ample, and general words or terms as can be devised, to prevent any dispute.

The first contingency is, in case there shall be no issue *living* at the time of the decease of *John* and *Esther*, or either of them; and the last clause that speaks of the payment of the 4000 *l*. mentions, that the interest of five *per cent*. shall be paid the first half year after the decease of *John* or *Esther*.

Mr. *Attorney General*, in reply for the plaintiff, compared this case to the common one in settlements of a limitation to *A*. for life, remainder to the issue male of his body, remainder over on failure of issue male, if there should be issue male at the decease of the father, yet if it should fail afterwards, the remainder over would still take place; and, that if upon the execution of the articles the 4000 *l*. had been in contemplation, there ought to have been an express covenant from the daughters to renounce the benefit of this provision, and as there is no such covenant, he submitted it to the Court, that the plaintiffs are still intitled to the 4000 *l*.

LORD CHANCELLOR,

This settlement is very inaccurately penned; it has been insisted that the meaning of it is, that if there should be a failure of issue male, in the life-time of *John Allen* and *Esther* his wife, then the 4000 *l*. should not be raised, and therefore, as there was issue male in the life-time of *John* and *Esther*, the contingency has never happened.

But this is an absurd construction, to confine it to issue male in the life-time of *John* and *Esther*, because it is expressly extended to issue male born in due time after the death of *John*, therefore this can never be the meaning of the words.

I do not think that the release under the articles is material on one side or the other, and therefore it may be thrown out of the case.

There are three considerations:

First, Whether the contingency has taken place upon which the trust of these terms was to arise, or not? And if it is still to be regarded as a beneficial interest, or whether they are attendant upon the inheritance?

Secondly, Whether the plaintiffs have barred themselves of their right to the 4000 *l*.?

Thirdly,

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MENILL.

Thirdly, Whether the defendant, Mr. *Menill*, is intitled to have an assignment of these terms?

As to the *first* question; upon taking all the circumstances of this case together, I am of opinion the contingency has not happened.

"That in case there should be no issue male of the said *John Allen* on the body of the said *Esther Stephenson*, begotten, at the time of the decease of the said *John Allen*, or of the said *Esther Stephenson*, which shall first happen, or in *ventre sa mere*, &c. *Vide the Settlement.*

"Or in case the issue male between them, shall all of them die without issue male, and that there shall be a failure of issue male of the body, &c. and that there be, at the time of such failure, *issue female*, one, or more daughters between them the said *John* and *Esther* begotten, *living* at the time of the said *John Allen's* decease, or of the said *Esther*, &c. then the trustees, &c. shall raise and pay, if one daughter, 3000*l.* if two or more, 4000*l.* equally to be divided, &c."

The ambiguity of this clause arises from the word *living*.

The counsel for the plaintiffs have construed *living* to refer to daughters living at the time of the failure of the issue male, and that the meaning of the words *living at the time*, &c. are to be taken as a further description in regard to the failure of issue male.

The counsel for the defendants have construed the word *living* to refer to the issue male, *living* at the time of the said *John Allen's* decease, or of the said *Esther*, which shall first happen.

[13]

The clause relating to the payment explains it still further, and shews the parents could not mean to extend the payment of these portions to a son's dying without issue male at any time whatsoever, for the brother might have lived to four-score years, which is too remote for them to have in their contemplation, and therefore they have fixed the payment at twenty-one.

The interest also was to commence upon the dying of *John Allen*, &c.

This refers to either dying without issue male, and in this case both died leaving issue male.

The meaning then is plain, that this was intended as a provision for daughters, if there should be only daughters at the time of the death of *John Allen*, or of the said *Esther*.

The common and ordinary provision in marriage settlements is, that if the sons die before twenty-one, then the trustees, &c. shall, by sale, &c. levy and raise, &c. and not that it should be stretched to a dying at any time.

The second question is, Whether the plaintiffs have barred themselves of their right?

To my apprehension, it was intended by the mother, daughter and son, that all the estate in the family should be parted with upon the consideration expressed in the articles.

It

It appears plainly too, that the son was to convey this estate to Mr. *Menill*, clear of every thing but the estate for life, which the mother had by virtue of her jointure, without any reservation besides for any other part of the family.

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Great part of the estate of *John Allen* was settled on the mother, with remainder to the son in tail, remainder to him in fee, and therefore the son by fine could have barred the remainder on all the estates, except the estate left by the grandfather.

The proviso was not intended to save any right the daughters might have upon any of the lands, and after having a sum of money in consideration of these articles, it would be too much for them to contend that they have a right to set up this demand.

It seems to me, that Mr. *Menill* has given very amply for this estate, and shall a mistake of the parties, who knew nothing of the 4000*l.* at the time, turn to the prejudice of a fair purchaser?

It is rightly observed, that the bill is inconsistent; for would they have the consideration of these articles and the 4000*l.* too, when their releasing all demands was the only pretence for the sum of 982*l.* the consideration money in the articles?

[14]

It is said, that the whole articles must be performed; but *Samuel Allen* has not performed his part, for he has not conveyed the *Brownell* estate, and therefore the articles are void: but still the defendant Mr. *Menill*, is intitled to his equity, for the heirs of *Samuel* ought to perform it.

And if the plaintiffs insist upon the 982*l.* they must convey to Mr. *Menill*, or else they are not intitled to it; which they agreeing to accept, Lord *Hardwicke* dismissed the bill as to the trust of the term set up by the plaintiffs, and they were decreed to convey by an assignment of the terms to Mr. *Menill* upon payment of 590*l.* part of the 982*l.* which sum was directed to be paid in thirds to the plaintiffs from the time of the conveyances executed, the residue of the 982*l.* was directed to be paid to the executors of the mother, the plaintiffs, *Malden* and his wife (1).

(1) *Reg. Lib. B. 1736. fol. 477.*

Anonymous, Michaelmas Term, 1737.

Case 9.

THERE had been no demand, or any rent paid in thirty years; the person who was intitled recovered it upon a verdict. Lord *Hardwicke* said the defendant must pay the costs at law, but as the laches arose on the part of the plaintiff, and the obscurity of the title to the rent, from the want of a demand for such a great length of time, he shall not be allowed costs against the defendant in equity (1).

Though no demand or rent paid in 30 years, yet the defendant must pay costs at law to the person recovering there, but none in equity.

(1) See *Clifton v. Orchard*, ante 1 vol. 610.

Case 10.

Mellish and De Costa.

LORD *Hardwicke* in this case laid down the following rules.

Vying and revying in affidavits not allowable.

That vying and revying in affidavits, is intirely discountenanced in the Court of King's Bench, a fortiori in a court of equity.

A guardianship may be applied for though no suit depending.

That there may be an application to the Court in the case of a guardianship of children, though there be no cause depending (1).

A testamentary guardianship not assignable.

That it is clear in point of law, a testamentary guardianship is not assignable.

Children have a natural right to the care of their mother.

**That the children have a natural right to the care of their mother (2): and his Lordship made an order on Mr. De Costa, the grandfather, who was a defendant in the cause, to deliver the children up to the mother, the wife of the plaintiff.*

[*15

(1) *Ex parte Edwards*, *post.* 3 vol. 519.
Ex parte Bircball, *post.* 3 vol. 813. *Spen-*
ner v. Chesterfield, *Amb.* 146. But see
ex parte Ricards, *post.* 3 vol. 518. with

respect to the confirmation of a *testamen-*
tary guardian.

(2) *Har. Co. Litt.* 88. b. n. 12.

Case 11.

Anonymous.

A bill for want of parties is not dismissed, but stands over.

A Bill in chancery, said Lord *Hardwicke*, is never dismissed for want of parties, but stands over, upon paying the costs of the day.

A decree to dismiss a bill on this account reversed in the House of Lords.

A decree of Sir Joseph Jekyll's, in a cause at the Rolls to dismiss a bill for want of parties, was reversed afterwards for that reason, and a decree of the same nature in the Court of Exchequer, was reversed likewise in the House of Lords.

Case 12.

Anonymous.

A witness if interested must produce the release before he can be an evidence.

LORD *Hardwicke* laid it down as a rule, that where a person has an interest, it is not sufficient for him that he has been satisfied, he must produce a release (1), or his evidence cannot be read.

(1) A general release and not a partial one. *Sandford v. Paul*, 3 *Bro. Cha. Rep.* 370. *Ves. junior* 398.

Oldin v. Samborn.

Howen
Case 13. *Equity*
1844 d.

LORD *Hardwicke* said in this cause it was improper for a guardian to purchase his ward's estate immediately upon his coming of age (1), but though it has a suspicious look, yet if he paid the full consideration, it is not voluntary, nor can it be set aside.

What acts of a guardian with respect to an infant's estate shall be good. If he gave a full consideration for his ward's estate, it will not be set aside.

An equity of redemption may be conveyed by bargain and sale. *Id.*

(1) See *Stedman v. Palling*, *post.* 3 vol. *Walmsley v. Booth*, *post.* 25. *Brooke v. 423. Gray v. Mansfield*, 1. *Ves.* 379. *Gally*, *post.* 34.

After Hilary Term, 1737.

Case 14.

LORD *Hardwicke* said, tho' a receiver is appointed by this Court, yet that will not alter the possession of the estate in the person who shall be found intitled at the time the receiver was appointed, so as to prevent the statute of Limitations running on during the right in dispute.

The statute of Limitations will run notwithstanding the appointment of a receiver.

Read v. Read, November the 26th, 1739.

[16]
Case 15.

LORD *Hardwicke* thought it a very strong suspicion of fraud in this case, that two separate bonds should be given upon the same day for different sums, and one of them just double the penalty of the other, where one bond for the whole sum was the most proper and natural method: his Lordship for this reason directed an inquiry before a Master into the consideration of the bonds (1).

Where two separate bonds were given the same day, an inquiry directed into the consideration on a suspicion of fraud.

(1) The testator devised lands to his son *Thomas*, in tail, at his age of 21 years, remainder to his other children; and directed that the rents and profits should be received by the mother of *Thomas*, until he arrived at the age of 21, for the maintenance of all the children. *Thomas* came of age, and having got in debt with his mother for board, money lent, &c. he at different times gave his mother bonds, notes, &c. for securing such debts. Two of these bonds were

dated the same day, and were for securing two sums nearly of the same amount: but it does not appear from the Register's book what the penalties of these bonds were. The other bonds and notes bore different dates. When this cause came on to be heard, his Lordship directed an inquiry before the Master into the consideration of the several bonds and notes given by *Thomas* to his mother. *Reg. Lib. B.* 1739. fol. 500.

January 14,
1739.

Graydon versus Hicks, and Graydon versus Graydon.

Case 16.

G. Atte
Burton
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H. Chy 225

THIS case arose upon the words of two wills, the one made by the father, and the other made by the mother of *Mary Graydon*, the plaintiff in the cross bill.

THE FATHER'S WILL. "I give the sum of one thousand pounds to my only daughter *Mary Graydon*, to be paid her at her age of twenty-one years, or on the day of marriage, which shall first happen, provided she marry by and with the consent of my executors, but in case she dies before the money become payable, on the conditions aforesaid, then I give the said thousand pounds equally between my two youngest sons, *Benjamin* and *Gregory Graydon*. Mrs. *Mary Gregory*, grandmother of *Mary Graydon*, *Mary Graydon* the mother, and Mr. *Jeremy Gregory* the uncle, to be my joint and sole executors."

THE MOTHER'S WILL. "Item, I give to my daughter *Mary Graydon*, all my wearing apparel of all sorts, with all my dressing plate, jewels, watch chain, &c.

"Then my will is, that in case my daughter *Mary Graydon* shall marry before she comes to the age of twenty-one years, without the consent and approbation of my executor, under his hand first had and obtained, (if he be living), *that then she shall not be intitled to any part of such legacies as I have herein left her*, but that whole share shall be equally divided amongst my sons *Benjamin* and *Gregory Graydon*; the residue, after her debts and legacies paid, she gives to her three children *Benjamin*, *Mary*, and *Gregory*, equally to be divided between them, or the survivors of them, share and share alike, and appoints her son *John Graydon* to be her sole executor."

The bill was brought by the plaintiff in the original cause, against the defendant *Hicks*, as the husband of *Mary Graydon*, to relinquish the thousand pounds which was left to the wife under the will of the father, she having married without the consent of the executors, and contrary to the direction of his will, and likewise to relinquish the legacies under the will of the mother.

The executors under the will of the father were all dead before the marriage of *Mary Graydon*.

And *John Graydon* appointed executor under the will of the mother, and who was to give his consent to *Mary Graydon's* marriage, renounced the executorship in the most formal manner in the ecclesiastical court.

The cross bill was brought by *Mary Graydon*, as a feme sole, against the plaintiff in the original cause, as one of the devisees over, under both wills, in case of *Mary Graydon's* marriage without consent, and likewise against Mr. *Timewell*, who took out administration to the mother, on the executor's renouncing, and likewise administration *de bonis non* to the father.

LORE

LORD CHANCELLOR. This case comes before me under very extraordinary circumstances; it is a melancholy consideration that some of the parties should be so void of honour and decency, and in the first place that a child should pay so little regard to the direction of parents; but I do not sit here to determine upon the moral character and moral behaviour, but I must determine upon the rights only of parties.

GRAYDON v. HICKS.

The first question is, whether *Mary Graydon* the plaintiff in the cross cause is married or not.

Secondly, If she is married, what effect that will have both in respect to the will of the father and mother.

As to the first question, I must take her to be married, and should do her a great injury if I did not, but here is such evidence, as would induce any jury to find the marriage; if there was the least doubt, I ought to direct an issue to try that fact, but there is no room for it in this case, as not the least evidence on the part of the defendant *Mary Graydon* has been offered, to make it doubtful.

The previous step towards a marriage was Mr. *Hicks's* courtship, and an application to the administrator Mr. *Timewell*, upon that footing; he said likewise to two persons, when he was asked if he was married, that he chose to conceal it for the present, for fear of his father, but promised to reveal it in a fortnight to *Timewell*; took her immediately after this to lodgings, called her by his own name, had a piece of plate with both their names engraved, a child born, and entered by *Hicks* himself, in the pocket-book of the register of St. *Giles's* parish, as the child of *Robert* and *Mary Hicks*, and no proof of their cohabiting otherwise than as man and wife.

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Therefore I ought to consider it as a marriage for the honour of the lady, though the gentleman has in a most dishonourable manner, upon his oath, denied the marriage: I am afraid interest had too large an influence in his answer; and as he appears to have had a very great sway over this unfortunate lady, or he could never have prevailed over her to bring a bill as a feme sole, I will put it out of his power to touch any of the fortune, that he may not embezel it to the prejudice of the child.

In consequence of my opinion the cross bill must be dismissed.

The first question upon the original cause is, what are the rights of the parties under the two wills.

As to the surplus of the father's personal estate, I must take it to be undisposed.

The rule of this court is, if there is any declaration that executors are but trustees, or if they have particular legacies, that

Where executors are declared to be only trustees, as undisposed (1).

or have particular legacies given to them, the residue shall be considered

(1) *Pring v. Pring*, 2 Vern. 99. *Young*, 2 Ves. 91. *North v. Purdon*, 2 Ves. 495. *Bennet v. Batchelor*, 3 Bro. Ch. Rep. 28. *Rushfield v. Carleles*, 2 P. W. 158. *Read v. Smell*, post. 645. *Androuin v. Poillem*, post. 3 vol. 299. *Bishop of Cloyne*

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HICKS.

the residue shall be considered as undisposed; there have been cases indeed where the wife alone has been appointed executrix, in which the court have held that she shall be intitled to the residue; but here the wife is not singly executrix, but two others are joined with her.

The consequence of this will be, that the children will be intitled to two parts and the widow to one.

The next consideration is as to the legacy of a thousand pounds to *Mary Graydon*, under the will of the father.

Here is certainly a disposition over in case of a forfeiture, so that it stands distinct from those cases where there is no devise over.

Where the condition is become impossible, by the person dying, whose consent was necessary before the marriage, it is an excuse.

It is the constant rule of law in conditions subsequent, that if the performance becomes impossible by the act of God, it is absolutely void (1).

I am likewise of opinion that this is only a condition subsequent, to divest the legacy, in case of a marriage before twenty-one; and it is the constant rule of law, in the case of conditions subsequent, that if the performance becomes impossible by the act of God, that it is absolutely void; for in *Co. Litt. 206. a.* it is laid down, that in case of a feoffment in fee, with a condition subsequent that is impossible, the state of the feoffee is absolute; and therefore the daughter, according to this rule, is intitled to the thousand pounds under the father's will.

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Two questions arise under the will of the mother, first, with regard to the specific legacy to the daughter, and secondly, with regard to the surplus.

I am of opinion that the latter clause goes to the whole, and that the words *she shall not then be intitled to any part of such legacies as I have herein left her*, being spoken at the same time, is no more a relation to what goes before, than to what follows, but is equally applicable to both.

The word executor in the mother's will is descriptive of every person who shall be administrator, being a power

But it has been objected, that this is not such a marriage as is a breach of the condition, because *John Graydon* the executor has renounced, and never took out administration, and therefore it has been granted only with the will annexed to Mr. *Timewell*.

not annexed to his office, but independent from the rest of his duty.

Now I am of opinion the objection is not well grounded, for this is a description of every person, who shall be administrator, and that this was a power not annexed to the office of executor, but independent from the rest of his duty as executor.

The portion under the mother's will is forfeited.

And therefore, upon the whole of this part of the case, I declare that this marriage is a forfeiture of the portion, given under the will of the mother (2).

(1) *Peyton v. Bury*, 2 P. W. 626. *Hervey v. Aston*, ante 1 vol. 361.
Jones v. Suffolk, 1 Bro. Cha. Rep. 529. (2) *Reg. Lib. A.* 1739. fol. 140.
See the note at the end of the case of

Walton v. Hobbs, December 10th, 1739.

Case 17.

WHERE there is a single deposition only, against the oath of a defendant in his answer, and the facts denied in the answer, are equally strong with those that are affirmed by the deposition, there the rule, that you can have no decree upon such single evidence, against the defendant, will hold; but where, as in the present case, there are a great many concurring circumstances that strengthen and support the deposition of this witness, it does not come within the aforementioned rule (1).

The rule that you can have no decree upon the evidence of a single witness against a defendant, holds only where the facts denied in the answer, are equally strong with those that are affirmed by the deposition.

(1) *Janſon v. Rany*, *poſt.* 140. *Hine Biſcoe*. 1 *Veſ.* 97. *Reech v. Kennegal*, 1 *v. Dodd*, *poſt.* 276. *Only v. Walker*, *poſt.* *Veſ.* 125. *Pember v. Matbers*, 1 *Bro.* 3 vol. 407. *Le Neve v. Le Neve*, *poſt.* *Cha. Rep.* 52. 3 vol. 649. 1 *Veſ.* 66. *S. C.* *Arnot v.*

Lyddall v. Weſton, January the 18th, 1739.

Case 18.

THERE was a reſervation in a grant of an eſtate by the crown, of tin, lead, and all royal mines within the premiſſes.

The maſter ſtates it, there is a probability that there are ſuch mines, and therefore he reports the plaintiff Mr. *Lyddall* cannot make a good title.

The exception is, that the maſter is miſtaken, for there is no evidence of ſuch mines, or even a probability of them.

LOKD CHANCELLOR,

I am of opinion the exception is well founded.

This is one of the caſes of willingneſs and unwillingneſs in a purchaſer.

It is the buſineſs of this court to carry ſuch agreements into execution, and muſt govern itſelf by a moral certainty, for it is impoſſible in the nature of things, there ſhould be a mathematical certainty of a good title.

The court of chancery, in carrying agreements into execution, govern themſelves by a moral not a mathematical certainty.

No pretence that there has been any ſearch for royal mines for 111 years, and, upon examination, the probability is great that there are no ſuch mines.

There are often ſuggeſtions of old entails, and often doubts what iſſue perſons have left, whether more, or fewer, and yet theſe were never allowed to be objections of that force, as to overturn a title to an eſtate.

No inſtance where the crown has only a bare reſervation of royal mines, without any right of entry, that it can grant a li-

royal mines, they cannot grant a licence to any perſon to come upon another man's eſtate and ſearch for ſuch mines. But when mines are once opened, they can reſtrain the owner of the ſoil from working them, and can either work the mines themſelves, or grant a licence for others to work them.

Where the crown has only a bare reſervation of

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WESTON.

cence to any person, to come upon another man's estate, and dig up his foil, and search for such mines; I am of opinion there is no such power in the crown, and likewise, that by the royal prerogative of mines, they have even no such power; for it would be very prejudicial, if the crown could enter into a subject's lands, or grant a licence to work the mines; but when they are once opened, they can restrain the owner of the foil from working them, and can either work them themselves, or grant a licence for others to work them.

It would be of mischievous consequence, to allow it to be an objection to a title, that it is derived under a grant from the crown, in which there is a reservation of such mines, especially as all grants from the crown have, for the most part, such a general reservation; but the fact in the present case is, there has never been an exertion of this right in a single instance, since the grant, and no probability there ever will (1).

(1) *Reg. Lib. B.* 1739. fol. 205.

[21]

Davis v. Davis, January the 26th, 1739.

Case 19.

aple Jackson
D. e Chetty 601

THIS cause came before the court upon an appeal from a former decree, and likewise upon exceptions to a master's report.

There was a bill brought for 100*l.* legacy, against the defendant, charged by a will upon a real estate, the reversion of which belonged to the defendant, the answer denied the whole equity of the bill, but was reported insufficient.

The master has reported the several processes regular in this cause, exceptions were taken to this part of his report, and it is insisted for the defendant, there is a material irregularity in the present case, because the process has never been duly served, and no endeavour to serve it; for the defendant has lived for twenty years in one place, is a considerable farmer, has appeared publicly, and deals publicly, is seised of a real estate of 20*l. per ann.* besides renting a large farm, so that he might easily have been found.

Upon exceptions to a master's report, you cannot read affidavits made subsequent to it, notwithstanding the affidavits of the adverse party, were filed but the evening before the report.

The counsel for the defendant, in support of this fact, offered to read affidavits subsequent to the master's report, upon a suggestion that the plaintiffs' were made but the evening before the master's report, and consequently they had not time to answer them; but Lord Chancellor would not allow them to be read, for he said, this would be determining the matter *ex post facto*.

They likewise insisted for the defendant, that this decree is *ex parte*, for the defendant has yet never been heard, notwithstanding he has put in an answer; for where a defendant by his answer denies the whole equity of a bill, though upon a reference to a master it is reported insufficient, yet it is so far an answer, that a bill cannot be taken *pro confesso*.

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DAVIS.

In support of this doctrine, the case of *Hawkins and Crooke*, before Lord Chancellor King, on an appeal from the Rolls, 2 Wms. 556. was cited, and *what materially weighed with the court in that case was, the costs being paid to the plaintiff*,* upon the defendant's answer being reported insufficient, and likewise the *subpoena's* being taken out for the defendant's putting in a better answer, so that this the Court said in some measure does establish it as an answer.

LORD CHANCELLOR,

[22]

There are two questions arise in this case :

First, Whether there has been an irregularity in serving the processess ?

Secondly, Whether there is error in the judgment of the Court ?

The *first* comes properly before the Court on exceptions to the master's report, in certifying that the processess of this cause were regular.

For if they had either irregularly issued, or had been irregularly served, the exception is well founded.

But upon hearing the affidavits on the plaintiff's behalf, I am of opinion that the master's report is right, and that the exception ought to be over-ruled.

It is most manifest in this case, that the defendant has absconded, and that he went armed; it is said indeed that a pitch-fork and hedge-bill are tools of his trade, but the question is, what use he made of them ? if to prevent his being arrested, they are as bad weapons as a sword or a dagger, and is such a reasonable terror, as may deter a sheriff's officer, without being a coward, from attempting to arrest.

It is true, if a process of outlawry and a *capias utlagatum* have issued irregularly, and there has been no attempt to serve them, the Court will make the plaintiff pay costs, but here is no pretence for a complaint of this sort in the present case.

The *second* question, is upon the decree that has been made upon the hearing of this cause.

And this is a very considerable question, with regard to the authority of this court, and the execution of justice in it.

I shall not give any conclusive opinion in this point, till I have consulted the Master of the *Rolls*; for unless some method can be found to remedy this inconvenience, any defendant may elude the justice of the court.

The practical register is not a book of authority, but it is better collected than most of the kind. *Vide* title *Sequestration*, page 328 & 330.

The practical register in chancery a useful book.

A plaintiff is not to be told, because he has a sequestration executed against a defendant, for not putting in his answer,

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After goods or a real estate are

fixed upon a sequestration for want of an answer, the plaintiff may still proceed till he has got the bill taken *pro confesso*.

* N. B. Mr. *Pears Williams* in his report of the case has omitted to mention this circumstance.

DAVIS v.
DAVIS.

and goods or real estate are seized upon the sequestration, that he must stop there, for he may still proceed in this court, till he has got the bill to be taken *pro confesso*.

The principal question is, whether the Court can take a bill *pro confesso*, where an answer has been put in which is reported insufficient.

The proceedings in this court are formed according to the course of the civil law in some respects, and the common law in others.

Now consider the proceedings of this court, compared with others; they have been formed according to the course of the civil law in some respects, and analagous to the common law in others.

The ecclesiastical courts proceed no further than excommunication, for contempt, the cause is at a stand till that censure is removed.

There can be no judgment in chief at common law upon a default; but after a seizure on a *capias utlagatum*, the remedy lies in a court of revenue.

At common law there are two defaults, one for want of appearance, and the other for want of pleading, and for this the defendant may be outlawed, but then there can be no judgment in chief; but after the estates and goods are seized upon a *capias utlagatum*, you must go into a court of revenue and in a suit in the name of the *Attorney General*, at the relation of the plaintiff, you may have a decree for these goods, or a lease of the defendant's lands from that court.

The act of the 5th of George the Second, *ch. 25.* empower the plaintiff to go on as well upon a sequestration for not appearing, as upon a sequestration for not complying with a decree, which could not be done in equity till then; for, according to the 1st *sect.* of that act, "where persons *do not enter an appearance* within the usual time, after a subpoena issues "and is justly suspected to abscond to avoid the process, then the court out of which such process issues, is to fix a day "for his appearance, to be inserted in the *London Gazette*, and "published on the Lord's day in the parish church of the defendant; and a copy of the order of the court is to be "posted up at some publick place at the *Royal Exchange* in "London; and on the defendant's *not appearing* within the time "limited by the court, the court may order the plaintiff's bill "to be taken *pro confesso*, his effects or estate to be sequestered "and the plaintiff's demand to be satisfied out of the estate or effects so sequestered."

In courts of law where there is no plea, judgment is by *nil dicit*, if an imperfect plea, the plaintiff must demur, and if allowed, then he has judgment, because the plea is insufficient.

In courts of common law, where there is no plea put in at all, the judgment is by *nil dicit*; but if a plea be put in though ever so imperfect, there cannot be a judgment *nil dicit*; the plaintiff must demur; and if the demurrer is allowed, then the plaintiff has judgment, because the plea or answer of the defendant (for the word *answer* is equally used at law as in equity) is insufficient.

So in equity the taking a bill *pro confesso*, is analogous to taking the declaration for true, where the plea or answer of the defendant is insufficient.

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DAVIS.

In equity taking
a bill *pro confesso*
is analogous to

taking a declaration for true at law.

Why is not taking a bill *pro confesso*, when an answer is reported insufficient, equally just, as taking a declaration for true, where the plea fails; for if a plea upon arguing the demurrer is found insufficient, unless the defendant put in a better plea, the plaintiff shall have judgment in chief (1)?

Though in equity you cannot demur because an answer is insufficient, yet taking exceptions to it before a Master, is tantamount to a demurrer upon an insufficient plea.

Taking exceptions
to an insufficient
answer, is tantamount to
a demurrer at
law.

What must the plaintiff do in such a case? Can he reply to an answer that has been reported insufficient, and is full of absurdities and inconsistencies? he must injure himself by such a reply, and therefore the court will not oblige him to it.

A plaintiff cannot have the same benefit, in carrying on the several processes upon a contempt of the defendant, before the hearing, as upon an absolute decree; for, in this latter case, the plaintiff after the processes have been executed, and goods and estate sequestered under them, may have both applied to satisfy his demand, which he cannot have upon processes for contempt only, and therefore there is a material and essential difference between the two.

These are the things which stick with me as to the principal point.

As to the case which has been mentioned before Lord King, I was of counsel in it, and I believe I may venture upon my memory to say, that the bar were not satisfied with the reasoning of that case; for I do not understand how receiving costs upon a Master's reporting an answer insufficient, can be said to be accepting it for an answer in any sort whatsoever (2).

The case of
Hawkins v. Crook
before Lord
Chancellor King,
the 10th of George
the Second, is
not determined
upon satisfactory
reasons, for re-
ceiving costs upon a Master's reporting an answer insufficient, is by no means accepting it for an answer.

Besides, in that case there was a third answer (which had never been referred for insufficiency) upon the records of the court; this was a material circumstance, for that answer standing as it did, the court would not examine whether it was sufficient or not.

Where there has been an amended bill, as in the present case, and no answer put in to it, then the question is, whether the plaintiff will not be intitled to a decree *pro confesso*, abstracted from any proceedings in the original cause.

[25]
Lord Hardwicke
was inclined to
think, that
where there is
an amended bill,

and no answer to it, the plaintiff is intitled to a decree *pro confesso*, abstracted from any proceedings in the original cause.

(1) See *Abergavenny v. Abergavenny*,
4 Vis. 446, pl. 1. 2 Eq. Ab. 179. pl. 5.

(2) See Lord King's Order, 2 Cox's
P. W. 559. n. 1.

DAVIS v.
DAVIS.

If the plaintiff should not be intitled to such a decree under these circumstances, then the authority of this court is very defective, and the justice of it may be eluded; but I will not give any judgment now, and, in the mean time, will order precedents to be searched (1).

N. B. This matter never received any determination, the parties having entred into an agreement to withdraw the appeal, and affirm the decree, which agreement was made an order of court the 10th of *December*, 1741.

(1) See *Helfam v. Robinson*, 4 *Vin.* 446. pl. 2.

Case 20.

Walmesley versus Booth, June the 29th, 1739.

S. C. cited ante
2 vol. 334.
S. C. cited 1
Vif. 380.
S. C. cited 2
Vif. 138, 260.
S. C. *Barn. Cba.*
Rep. 475.
Japhet Crook, in
1728, being under
a prosecution
for perjury and
forgery, employed
the defendant
as his attorney
to get bail, which
he did accordingly,
and, during this trans-
action, drew
Crook's will, who
directed a legacy
of 1000*l.* to the
defendant, and
500*l.* a-piece to
the bail, and af-
terwards the de-
fendant got a
bond for the se-
curity of his le-
gacy: *Crook* af-
terwards revokes
this will, and by
another appoints
the plaintiff executrix, and makes her residuary legatee; after the death of the testator, the defendant brings an action on his bond, and has a verdict and judgment; a bill brought to be relieved against it for fraud; *Crook* living six years after giving the bond, and not attempting to be relieved, Lord *Hardwicke* decreed for the defendant.

JAPHET *Crook*, in the year 1728, being under several prosecutions of a criminal nature in the court of King's Bench for perjury and forgery, employed the defendant *Booth* as his attorney, who (after many fruitless endeavours of *Crook* himself to get bail) by his diligence found out two persons to be bound with *Crook* in a recognizance in very large sums, and in the course of these transactions the time of the defendant was principally taken up for many weeks: in this interval he drew the will of *Crook*, who gave instructions for it himself in writing, in which, with his own hand, he directed a legacy of 1000*l.* to the defendant, and 500*l.* a-piece to the bail: the will was prepared by the defendant, and executed by *Crook*; and, after this, at the request of the defendant, *Crook* gives him a bond for the security of his legacy, in which there was a condition in the words following, or to this effect, that "Whereas *John Booth* has been serviceable to *Japhet Crook* in several causes, and still continues to be so, and the said *Japhet Crook* being thoroughly sensible of his services and favours, if the said *Japhet Crook* shall leave to the said *John Booth* a legacy of 1000*l.* then the obligation shall be void, otherwise to stand in full force." *Crook* afterwards revoked this will, and, by another will, appoints *Mary Walmesley* executrix, and makes her residuary legatee, by which she becomes intitled to 17,000*l.*

[26]

The legacy to *Booth* under the former is omitted in the new will, the testator declaring in this will, that the procuring that legacy from him, was by imposition: *Crook* died in 1734, and some time after *Mary* intermarried with one *Walmesley*, against whom *Booth* brought an action upon the bond, and had a verdict and judgment, and a bill is filed here by *Mary* and her husband to be relieved against it as obtained by fraud and imposition.

Lord

Appington
Bodden
L. Denny & Warren
184
Bennetley
Stewart
L. Denny. 175.

LORD CHANCELLOR,

WALMESLEY
v. BOOTH.

This is one of those kind of bonds, which the court must dislike at the first appearance; but notwithstanding there must be some circumstances of fraud, or a want of consideration, to induce me to lay it aside.

Now upon the circumstances of the case, and upon the recital of the bond, I must take this to be a voluntary bond; for though here is a mention of services, yet they are not such as will create a debt, or a valuable consideration; nor are they such as will make it, in its nature, a demand, or what the law calls a valuable consideration.

I should have thought it a much stronger case, had it been for payment of money at a certain day, but this is to be paid futurally by an executor: Now *Crook* might not leave assets; for though in sufficient circumstances at the time of giving the bond, yet he might have contrived it so as to have no assets at his death; and it is truly said, that such a bond, according to the case in Lord *Harcourt's* time, shall be postponed to all debts whatsoever, even simple contract ones, so that this can by no means be a security for money.

It has been insisted on, that as this person stood in no other light than an attorney to *Crook*, he cannot intitle himself to the bond.

To be sure it is extremely wrong in an attorney to take bonds for services; but if a client, with his eyes open, will give such a bond, it would be going too far to say such a bond is absolutely void. An attorney ought not to take a bond for services, but if a client will give him one of his own accord, it is not absolutely void.

This case has been compared to that of young heirs in distress for money in the life-time of the father; but I do not think this comes up to the present case, for there the court presumes weakness in the person, and upon that consideration relieves; but there is no pretence for it here, for *Japhet Crook* was more likely to impose, than to be imposed upon (1); and yet if there had been the slightest evidence of imposition upon *Crook*, I should make no scruple of relieving against this bond.

The length of time that *Crook* lived after the executing of this bond, is certainly a strong circumstance in favour of the defendant. Why did not *Crook*, if he thought himself aggrieved, in six years bring a bill to be relieved, for he had the same equity which the executrix sets up now by the present bill? Upon the whole, I am of opinion, on the circumstances of this case, that the bond cannot be relieved against, and that the injunction which was to stay the proceedings at law must be dissolved.

[27]

(1) See ante 1 vol. 334. but see *post*. 29.

Walmesley versus Booth.

May the 2d, 1741. In the Paper of Rehearings.

LORD CHANCELLOR,

Lord Hardwicke,
on this cause be-
ing reheard, re-
versed his former
decree.

Isabelyn Dalby
vs Crook 170.

vs Crook 170.
vs Crook 170.
vs Crook 170.

This is a case of a good deal of consequence, and I am extremely glad that I have an opportunity of re-considering in the manner it deserves.

I believe I did say at the former hearing, that it would be extraordinary thing if the representatives of *Japhet Crook* should prevail to set aside a bond fraudulently obtained, and by imposition upon a man, whose character for art and cunning was well established in the world.

But upon this case being re-argued and re-considered, I am thoroughly convinced that my former decree was wrong.

The first consideration arises upon the general nature of bond, as it was obtained by an attorney from his client, where the client was under criminal prosecutions: I think this very material ingredient in the case, and are the principal grounds I go upon in giving judgment in this case.

The Statute of
2 Geo. 2. c. 23.
lays down cer-
tain rules for re-
gulating the be-
haviour of attor-
nies and solicitors
with regard to
their clients.

Where an attor-
ney is retained to
appear, and does
not, the court
will punish him
for it; an attor-
ney once chosen
cannot be changed without leave of the court.

Attornies and solicitors, especially since the late act of parliament, 2 Geo. 2. c. 23. have been considered as officers of justice, and they have stated fees allotted them, which they are not to exceed; and therefore in all courts, but more especially in courts of law, there are certain rules for regulating their behaviour with regard to their clients.

Upon this ground, if a man retains an attorney to appear for him, and he does not appear accordingly, the court will punish him for it; and on the other side, they will not suffer a person who has made choice of an attorney in a cause to change without the express leave of the court.

The court will
relieve a client
against the extor-
tion of an attor-
ney (1).

[28]

The consequence of this is, that there is a strong alliance between an attorney and his client, and a great obligation on the attorney to take care of his client's interest; and the court will relieve a client against the extortion of an attorney.

This is the general rule; let us now consider the present case.

The defendant Mr. *Booth* does not pretend to say that he had the least acquaintance with *Japhet Crook* till October 1 and very little business appears to have been done from time till the giving the bond; and allowing that all fees paid, and every thing admitted besides that could be charged for the most trifling attendances during the period from the time of the bond, it is not pretended there was any more than 26 s. due to the defendant at the time of the execution of the bond. *Japhet Crook* was then under prosecution for two different offences of a very heinous nature, one for forgery, and another

(1) Vide *Drapers' Company v. Davis*, post. 295. *Saunderson v. Glasf*, post. 2

for perjury, for which he afterwards suffered as he deserved: and under these circumstances to be sure it concerned him very much to find out persons who would be bail for him.

WALMESLEY
v. BOOTH.

There are a great many people, without doubt, that bring distress upon themselves; but while they are in such a situation, it does not make the least difference, whether this distress came upon them through their fault or their misfortune.

While *Japhet Crook* was in this deplorable condition, the defendant draws his will, and gives himself a legacy of 1000*l.* This is no very favourable circumstance, that an attorney who draws the will of a person in such a situation should take the advantage, and secure to himself a legacy of 1000*l.* and, besides the inserting the legacy in the will, it is carried much further, and *Japhet Crook* is prevailed upon by the defendant to give him a bond, reciting many and faithful services, and particularly the procuring bail on the criminal prosecutions, and the bond to remain in full force till the executors of *Japhet Crook* shall pay to the defendant the sum of 1000*l.* in six months from the testator's death; so that by this means the money is secured, and it is, to all intents and purposes, made irrevocable.

It has been said by Mr. *Chute*, that this is only a legacy given with a preference; but it differs very materially from such a legacy, because *Japhet Crook* has bound himself in a bond, which makes it a debt, and irrevocable.

Upon these considerations, and attended with such circumstances, the defendant appears in a very unfavourable light to the court.

This case has been compared, in the first place, to the defrauding of young and improvident heirs, where the court relies upon general principles of mischief to the publick, without requiring particular evidence of actual imposition upon them, as they are cases of general concern; they also give relief, because the circumstances and situation of the young persons at the time of the agreement make them extremely liable to impositions (1).

[29]

Now consider the condition of *Japhet Crook* at the time of entering into this bond; he was under very severe prosecutions, for very heinous offences, and, in such a case, was obliged to call in an attorney to his assistance.

It has been said that *Japhet Crook* was a very cunning fellow, and a very great knave, and I believe it to be true; but the court must not consider the particular circumstances of the man, but the case in general (2); for a person may be prosecuted for these very crimes, and yet be innocent; and it would be very mischievous if there was any encouragement given to an undue advantage taken of another under such circumstances.

The next case to which it has been compared are marriage-brokerage bonds, which have some similitude, though not entirely so (3).

The next was the case of mortgages, as where a person takes the advantage of another's necessities, and secures to himself an

(1) See *post*. 36. (2) See *ante* 26. (3) *Smith v. Aykewell*, *post*. 3 vol. 566. exorbitant

WALMESLEY
v. BOOTH.

exorbitant interest; in which instance, the court will set it aside if he gets any unjust gain to himself, though it be not done in the bare-faced way of interest, but in some other shape.

What is the general rule the court goes upon? why the person's being in such circumstances that any body might have taken the advantage of him, and here the court will not allow *A.* any more than *B.* to get an illegal benefit to himself.

So, in this case, *Japhet Crook* was no more under an obligation to employ the defendant as his attorney than any other.

I think the case is stronger between attorneys and their clients, than any of the cases that it has been compared with by the counsel.

Because all the courts, both of law and equity, order their bills to be taxed: and there are a number of cases in this court, where a client, unassisted by an attorney, has paid a law bill, and accepted of a receipt for it, and yet has been allowed to open the whole account notwithstanding, and to take exceptions to any improper or extravagant charge in the attorney's bill.

Equity will order an attorney's bill to be taxed, tho' he has a mortgage to secure the payment of it (1).

[*30]

Nay, even if a client has given an attorney a bond or mortgage to secure the payment of what was charged to be due to him on account of a law-suit, the courts of equity have relieved the client, and ordered the bill to be taxed.

And what is the reason the court goes upon, in such determination? why, the great power and influence that an attorney has over his client.

Now, consider the present case; here is an extravagant reward given for services, and the court, if they had allowed the legacy, would, in the first place, have directed the Master to inquire what these services were, and whether they were in any proportion adequate to the reward.

These two cases have been put by counsel: that after a suit is finished, if a bond is given to an attorney, to secure to him some reward for his merit and service in a cause; or if after a marriage had, a security is given to a person who was instrumental in procuring the match, for a considerable sum as a reward, that this court would have supported them as just demands.

These are certainly very different cases from the present, but I do not know, that, even in these, there has ever been any determination.

But the bond here does not import any thing of this kind, for it only recites some past services, which were immaterial and trifling; but the principal consideration is for any future services he may be ready to do him.

To be sure, after a suit is intirely at an end, a client may give an attorney a reward for services, over and above his legal fees (2).

These are my reasons with regard to the publick; but there are other reasons that weigh with me in this case.

The defendant has said in his answer, that this is a voluntary bond, but then he has likewise set forth the reasonable motives

(1) *Drapers' Company v. Davis*, post. 295. (2) *Oldham v. Hand*, 2 Vef. 259.

which might induce *Japhet Crook* to give this bond; namely, the many and frequent services the defendant had done.

WALMESLEY
V. BOOTH.

Now what are they? only the few transactions from *October 1728*, to the time the bond bears date.

This is a false recital; and shews likewise, that there is some imposition, and an undue advantage taken of *Japhet Crook's* necessities.

There is another circumstance too; it appears that the bail was given upon the *certiorari* the very day the bond was given, just at a period of time when *Japhet Crook* must have gone to prison, or put in bail; I do not enter into the consideration of hired bail, because it does not appear what was the nature of this bail.

[31]

Now what is the defendant's merit as to this bail? It does not so much as appear that he gave any counter security to the bail, so that he has done nothing more than what every attorney does in the common cases of bail.

Upon the whole, I am of opinion that the court ought to pay no regard to such a bond, as it might be attended with bad consequences, by encouraging attornies, after they have got into the secrets of their clients, to extort from them unreasonable rewards to themselves (1).

The question is, whether this bond may stand as a security for such services as the defendant has really done, and for such demands as are really due.

And as the plaintiff submits it should, I do not see any reason why the court should interpose.

But I shall give directions to the Master to inquire what extraordinary services the defendant has done to intitle him to any reward, and what is justly due for fees; and his Lordship made an order accordingly.

(1) Vide *Oldham v. Hand*, 2 Vef. 259. *Hylton v. Hylton*, 2 Vef. 549.

Simpson versus Vaughan, February 1, 1739.

Case 21.

S. C. cited 2 Vef. 101.

A Bill was brought by the obligee in a bond against *Vaughan* the representative of *Nut*, who was a co-obligor with *Baker*.

A tradesman ignorant of the nature of a bond, fills up one from

A. and B. to C. in which the obligors are only jointly bound; one of them is dead, and the question was, whether the survivor is answerable for the whole money. The court relieved upon the mistake.

The bond was dated the 18th of *September 1730*, and filled up by *Baker*, one of the co-obligors, as follows:

"*John Nut* and *Joseph Baker* are held and firmly bound in the sum of 4000 *l.* for which payment justly to be made, we bind ourselves, our heirs, executors and administrators.

"The condition of this obligation is such, that if the above bounden *John Nut* and *Joseph Baker*, their heirs, &c. do well and truly pay the sum of 2000 *l.* then this obligation to be void."

Ball v. Morris
1. A. Nutt - a
2. Joseph Baker
2. We Call
557
Wright
It
Hamilton
3. Jones & Co

SIMPSON
v. VAUGHAN.

nut & baker v. farwell
Ad. 222. N. 314.
Alexander v. Charles
10y d. & Gould. 145

It was recited in the bond that *Nut* and *Baker* were partners. *Nut* died in 1732. *Baker* possessed all the joint effects, and five months after the death of *Nut* became a bankrupt.

The plaintiff suggests by his bill, that as the bond was filled up by *Baker*, that omitting severally bound, was done fraudulently, or through ignorance and mistake; and therefore he ought to be relieved, either on the point of fraud, or that the representative of *Nut* confesses assets by his answer, his debt ought to be satisfied out of the said assets; for the defendant *Vaughan* has set forth by his answer, that *Nut*, as a relation one *Hawkins*, became intitled by distribution to the sum 1200 *l.* as his share of the personal estate of *Hawkins*, and that *Vaughan*, as one of the representatives of *Nut*, has permitted this money to be retained by the administrator of *Hawkins*, indemnify him against the plaintiff's demand on account of *Nut* and by virtue of his bond.

The defendant insists that the assets of *Nut* are not liable, because the bond is joint, and not joint and several; and therefore *Baker*, by survivorship is answerable for the whole money.

LORD CHANCELLOR,

There is something new in this case; and yet, upon the general reasoning of this court, equity will extend it further than the law will do; now as to this, it cannot be laid down as an invariable rule, that the court will do it in every case.

The remedy in point of law was extinguished, as against *Nut*, and survived only against *Baker*.

The principal ingredient for the plaintiff, is, that 'tis not debt in the way of trade, but is an actual loan of a sum of money, and the debt consequently arises from the contract itself and if there is any defect in the contract, the court will resort to what was the principal intention of the parties, that they should be severally and jointly bound (1).

A note of hand at the beginning mentioned to be for 20 *l.* borrowed and received; but at the latter end were these words, *which I promise never to pay.* Lord Chief Justice Parker held, the plaintiff in the action was well intitled upon the lending on one side, and the borrowing on the other, notwithstanding the words in the conclusion of the note.

I have upon other occasions mentioned the case on the Northern circuit, before Lord *Macclesfield*: A girl, in consideration of 20 *l.* submitted herself to the pleasure of a man; he was so ungenerous afterwards as to refuse payment, and she was obliged to sue him upon his note, which, in the beginning it, was mentioned to be for 20 *l.* borrowed and received, but the latter end were these words, *which I promise never to pay.* My Lord *Macclesfield* held, that here is a good foundation for an *assumpsit*, upon the lending on one side, and the borrowing on the other; and the words in the conclusion of the note make no variation, and consequently the plaintiff in the action is well entitled to recover the 20 *l.*

It is the lending of one side and the borrowing of the other makes the strength of these cases.

As to the word *partners* being recited in the bond, that is rather in the nature of an addition than any thing else, and of great stress to be laid upon it.

[*33]

(1) *Primrose v. Bromley*, ante 1 vol. 90. *Bishop v. Church*, 2 Vef. 100. 371.

All cases of this sort must depend upon their particular circumstances.

SIMPSON
v. VAUGHAN.

Now here is a reasonable presumption that this bond was either through fraud, or for want of skill, made a joint, instead of a joint and several bond; for *Baker*, one of the obligors who filled it up, is only a tradesman, and intirely unacquainted with the common form of bonds, where money is lent to two persons; but I do not think it was a fraud in *Baker*, but merely a mistake, and this is a head of equity on which the Court always relieves (1).

Where money is lent to two persons, and either through fraud, or for want of skill, the bond is made a joint only, instead of a joint and several bond, these are heads of equity on which this court always relieves.

The second question, Out of what fund is this money to arise?

Now it cannot be insisted that the 1200 l. left in the hands of *Hawkins's* administrators, is by any particular agreement made liable to *Simpson's* debt, but merely left as a security to indemnify them against the demand.

The next question will be, Whether these persons, viz. *Hawkins's* administrators are proper parties to this suit?

It has been said at the bar, that you may make any person a defendant that you apprehend has possessed himself of assets upon which you have a lien: but this certainly cannot be laid down as a general rule; for it would be of dangerous consequence to insist, that you can make any person a defendant who has assets, unless you can shew to the Court he denies that he has any such assets, or applies them improperly.

It is not a general rule, that any person who has assets may be made a defendant, to constitute him a necessary party, the plaintiff must shew he either denies

such assets, or applies them improperly.

But, however, in the present case, the Court may give such directions as will reach the sum of 1200 l. for I shall order the administrators of *Hawkins* to retain this money in their hands, till Mr. *Vaughan* has discharged this debt to *Simpson*, and upon such payment, the administrators of *Hawkins* shall assign the 1200 l. to *Vaughan*, or such person as he shall appoint; and his Lordship was pleased to order accordingly (2).

(1) *Uvedale v. Halfpenny*, 2 Cox's P. W. 151. *Motteux v. London Assurance*, ante 1 vol. 545. *Henkle v. Royal Exchange Assurance*, 1 Ves. 318. *Baker v. Paine*, 1 Ves. 456. *Harwood v. Wallis*, cited 2 Ves. 195. *Heneage v. Hunlake*, post.

457. *South Sea Company v. D'Oloff*, cited 2 Ves. 376. post. 525. S. C. *Eden v. Bute*, 7 Bro. P. C. 204. 445. *Shelburne v. Inchiquin*, 1 Bro. Ch. Rep. 338. *Bell v. Cundall*, Amb. 101.

(2) *Reg. Lib. B.* 1739. fol. 152.

Case 22. *Brooke, Executor of Hobart v. Gally, April the 25th, 1740-
Easter Term.*

S. C. Barn. Ch.
Rep. 1.

A school-boy
contracts a debt
of 59*l.* for
burgundy, cham-
paign, claret, &c. with *G.* a victualler, in five months time; in a few days after he came of age, *G.* prevails on him to give a note for the 59*l.* without producing any account, or delivering him a bill. Lord Hardwicke, upon the circumstance of the case, decreed the note to be delivered up to be cancelled.

THE bill was brought by the plaintiffs, as executor of *Hobart*, against the defendant, to have a note delivered up to be cancelled (which *Hobart* had given to the defendant,) upon a charge of fraud and imposition.

Lord Hardwicke, upon the circumstance of the case, decreed the note to be delivered up to be cancelled.

*See v. Fleming
Mass: v. 15. 149.*

LORD CHANCELLOR stated the case in the following manner. A young gentleman, admitted to be an infant, and known to be a school-boy at *Montigniack's French school*, near *Oxford chapel*, takes it into his head to resort to *Gally's coffee-house*, or rather victualling-house, as all sorts of meat and liquors were sold there; and the master of it suffers a school-boy, just turned of twenty, to contract a debt of fifty-nine pounds, in the space of five months, from *April 1735* to the *September* following, when his allowance in pocket-money by the guardian was only seven shillings a-week, and in my opinion very sufficient.

The things for which he contracted the debt, were for meat either for himself, his friends, or his dog, or for liquors sent to his lodging, which was the school; in one day claret to the amount of 3*l.* burgundy 1*l.* 10*s.* champagne 2*l.* 7*s.* in the whole 6*l.* 17*s.* 1*l.* 15*s.* was charged another day for rack punch sent to his lodgings; another day coffee and jellies, which, if it had rested there, might have been excusable, if done once or twice only; but it was by no means commendable to give an infant such long credit as six months for even these things.

The defendant's telling Mr. *Montigniack* when he came to inquire after his scholars' behaviour, that it was no business of his, was a very improper answer to the school-master, and an evidence that he was doing wrong, and wanted to conceal it.

As to the young man himself, he appears to have been often in liquor, and the facts speak itself, considering the great quantity of wine, &c. which were so frequently sent him.

In two or three days at most after *Hobart* came of age, *Gally* prevails upon him to give a note for the 59*l.* though no account appears to have been kept of the dealings, nor any bill delivered after *Hobart* came of age.

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This case will turn upon two general considerations:

First, As to the transactions between *Hobart* and *Gally* before the promissory note was given, and before he was of age.

Secondly, On the alteration that has been made, by a promissory note being given, and upon the circumstances at the time it was given.

As to the *first*, they are transactions of such a nature, as ought to be discountenanced in a court of equity.

BROOKS v.
GALLY.

The law lays infants under a disability of contracting debts, except for *bare necessities*, and even this exemption is merely to prevent them from perishing (1).

The reason why the law lays them under such restrictions, is to prevent their being imposed upon, unknown to their parents or guardians.

Neither law nor equity know any difference between an infant of sixteen or seventeen, and one turned of twenty, there being a precise time fixed for their coming of age, and the latter may be equally relieved with the former; for, till he arrives at twenty-one, he is considered as an infant.

Between an infant of 16 or 17, and one turned of 20, there is no difference either in law or equity, the latter, if imposed on, equally relievable with the former.

From all the circumstances of the case which I have stated before the giving of the note, it is very plain, that the defendant acted *malâ fide* by giving evasive answers, and by endeavouring to secrete what he was transacting with the infant.

As to the *second* point :

It is truly said on the part of the defendant, that if an infant takes up goods before he comes of age, and gives a note for it after he is of age, if there is no fraud, it is good at law (2).

If an infant takes up goods before, and gives a note for them after he comes of age, if no fraud, good at law.

It has been likewise said *the executor of Hobart*, the plaintiff, is a mere volunteer; but I shall not consider him as such, for, as standing in the place of *Hobart* (who, if he had been living, and had waked out of his drunken sleep, might have been relieved,) he is equally intitled to relief as suing in his right.

Where an unconscionable bargain is made with an infant before he comes of age, and a note of hand is taken

from him immediately on his coming of age; the Court, on a bill brought even by his executor, will order it to be cancelled; for attempting thus to substantiate such a bargain, made with an infant during his infancy, is a principal ingredient with a court to relieve.

Where it is manifest there has been an unconscionable bargain made with an infant before he comes of age, the taking a note of hand from him in two or three days after he is of age, to substantiate it, is a suspicious circumstance, and has always been a material ingredient to direct the conscience of this court (3).

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It is very strange, that there should be no account subsisting for dealings of five months, nor any pretence of a bill delivered after *Hobart* came of age, nor is there any evidence that a bill lay before him for his consideration, at the time he gave the note.

So that here is a note without any previous consideration, which, to establish, would be contrary to the rules of this court (4).

(1) *Vide Zouch v. Parsons*, 3 Bro. 1801.

(2) *Smith v. French*, post. 245.

(3) *Oldin v. Samborne*, ante 15.

(4) See *Chennel v. Churchman*, 3 Bro. Cha. Rep. 16. in note. *Minsbaw v. Jordan*, 3 Bro. Cha. Rep. 17. in note.

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GALLY.

If the care and education of youth have been thought of consequence in former ages, or of publick concern by the parent to give any encouragement to a transaction of this kind, would intirely defeat that care, and be extremely fatal to the health, the manners, and every thing else that is valuable in young persons.

The case the nearest to this, is the imposition upon young heirs, in the life-time of their ancestors, who thought of full age at the time of the fraud, yet if his necessities, extravagancies, or the severity of his parents, made him submit to the imposition, this court will give relief merely to discourage attempts of this nature (1).

I think it necessary to make an example of the defendant in *Westminster-Hall*, as it is so near a neighbour of *Westminster-School*; and, upon the whole circumstances of the case, do decree the note to be delivered up to the plaintiff to be cancelled: but if the defendant should be minded to bring an action at law for goods sold and delivered, he shall not be enjoined from doing it; and I will likewise direct the executor to admit assets, and not to insist upon the statute of Limitations, *pendente lite* in the court of chancery, but, at the same time, I shall limit him to bring his action by *Michaelmas* term at furthest; that he may not, through vexation, defer it as long as he thinks proper; and his Lordship made an order accordingly.

(1) See *ante* 29. *Freeman v. Bishop*, Rep. 1. *Stanbope v. Cope*, *post*. 231. *post*. 39. *Gwynne v. Heates*, 1 Bro. Cha.

Case 23. *Asbburnham* versus *Bradshaw*, April the 26th, 1746, upon the Equity reserved.

Asbburnham v. Bradshaw
2 Wilby. H. & G. 22

S. C. Barn. Cha.
Rep. 6. S. C.
cited 1 Ves. 33.
S. C. cited *post*.
3 vol. 552.
A devise to charitable uses under a will in 1734, the testator lived a month after the new statute of Mortmain took place; all the judges, except Mr. Justice Denton, certified that the devise was good in law.

THERE was a devise to charitable uses under a will in 1734, the testator lived till July, 1736, a month after the new statute of Mortmain took place, and then dies without revoking his will: it was referred by the Court of Chancery to the Judges for their opinion, whether this was a good disposition to charitable uses; and all of them, except Mr. Justice Denton, who was ill, certified that the devise to these uses was good in law, notwithstanding the act; and thereupon Lord Chancellor declared the will should be established, and the trusts of the charity carried into execution (1).

(1) *Reg. Lib. A.* 1739. fol. 441. See *ford*, *ibid.* 186. *Attorney General v. Attorney General v. Loyd*, *post*. 3 vol. 551. *Heatwell*, Amb. 451. *Attorney General v. Downing*, Amb. 550. *Andrews*, 1 Ves. 225. *Willet v. Sand-*

Tuffnell versus Page, April the 28th, 1740.

Case 24.

WILLIAM Springet made his will in writing, signed by himself, but unattested by witnesses, wherein was the following clause, "All the estate which I have I intend to settle in this manner; My estate in *Kirby-Hall*, near *Henningham-Castle*, by *Henningham* town, which is 135 *l.* per ann. 128 *l.* exchequer annuity (and his stocks, which the testator enumerates) all which I give to my dear brother *Anthony Springet*; after his death, my desire is, that it should be disposed of after this manner; To *Mr. William Tuffnell*, the son of *Samuel Tuffnell*, esq. at *Langley*, in *Essex*, my estate at *Kirby-Hall*."

S. C. Barn. Cha. Rep. 9. S. C. 2 P. W. note 261. S. C. 2 Eq. Ab. note 298. W. S. makes his will and signs it, but no witnesses; as the testator had not surrendered his copyhold estate, the question was whether it passed? held it did;

In the statute of Frauds and Perjuries relates to such estates only as pass by the 34 & 35 H. 8. which takes in fee-simple only, and does not extend to customary estates.

Henderson

Fairbridge

1. Russell 479

Willam

Lancaster

2 Russell 11

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to such estates as pass by the statute of Wills, 34 & 35 H. c. 5. which is an act to explain one made in the 31st of the same king, and at the close of the third section enacts, that the words *estate of inheritance*, in the former statute, shall be declared, expounded, taken and judged of estates of fee-simple only, which shews plainly, that it does not extend to customary estates, and has been so settled ever since the case of *Attorney-General versus Barnes*, which is reported in 2 *Ver* where it is said, in page 598. "As to such of the lands as were copyhold, it was agreed, they were well appointed, the passing by surrender and not by will, though there were no witnesses to it."

Where the legal estate is in trustees, copyhold lands will pass under the will of the cestui que trust, as he cannot in that case surrender them (1).

As to the second question, whether the will of *William Springet* will pass the trust of the copyhold lands; where the legal estate is in trustees, the *cestui que trust* cannot consequently surrender, but the lands shall notwithstanding pass by this devise according to the general rule that equity follows the law, for there a copyhold will pass under a will, without three witnesses or where there are no witnesses at all; and if this nicety is not required in passing the legal estate, *a fortiori* it is not in passing the equitable, and therefore the *cestui que trust* may by the same kind of instrument dispose of the trust estate, as if he had the legal estate in him.

There is another question made in this cause, and that what interest the plaintiff has in the estate at *Kirby-Hall*.

The word *estate* in a will is sufficient to pass not only the land, but the interest the testator has in it (2).

I am of opinion the word *estate* is sufficient to pass not only the land, but all the interest the testator had in it besides; for though here is a locality, *Kirby-Hall*, yet the testator meant an interest in it too; for suppose, and I believe it has happened, a man should give all his real estate in *England*, here is a locality and yet none will say, that the interest does not pass as well the estate.

"All the estate which I have, &c." at the outset of the will, shews a plain intention in the testator to dispose of the whole, and consequently *Mr. Anthony Springet* the first taker had only an estate for life, and the remainder-man *Mr. William Tuffnell* an estate in fee; and therefore the plaintiff is intitled to the decree he prays by his bill. The case of *Ibbetson versus Beckwith* * was principally relied on by the plaintiff's counsel, as being in point, and allowed by Lord *Hardwicke* to resemble it very much.

(1) See *Car v. Ellison*, post. 3 vol. 75. (2) *Ridout v. Payne*, post. 3 vol. 486. as to the note thereto.

* *Cases in Equity in Lord Talbot's time* 157. "A testator setting out in his will to give and dispose of his worldly estate, is a strong proof that he intended to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose; the words *estate as such a place*, or *in such a place* may carry a fee." *Ibbetson ver. Beckwith*.

See *Knott*
250
4. *Bing. N. C. 455*.

Berkley Freeman versus Bishop, April the 27th, 1740.

Cafe 25.

IN this case the Lord Chancellor laid down the following rules. S. C. Barn. Cha. Rep. 15. reported more fully.

That an heir of 22 or 23 years of age, if a dealer in horses, or other tradesmen, impose upon him, by selling at extravagant prices, in numberless instances, shall be relieved in this court, otherwise if in a single instance only.

This court, in relieving an heir against fraud, does not consider whether the estate in expectancy comes to him as heir to his father, and by descent, or from any other relation; but the rule which directs in this case, is the necessity that young heirs are in for the most part, which naturally lays them open to impositions of this kind (1).

Where an extravagant price is charged for goods sold, and a mortgage is taken to secure it, the heir may be relieved so far as it stands as a security for the unjust gain; but after it is determined upon a *quantum meruit*, what was the real worth of the goods, the mortgage will still be binding upon the heir, for so much as is found by the verdict.

(1) See *Brooke v. Galley*, ante 34. 36.

Hill versus Adams, April 29, 1740.

Cafe 26.

WHERE a title is set up to an estate, by a bill, and you make a person defendant, who disclaims all right, and do not bring him to hearing, the Court said you shall not read his evidence as a proof of your own right, to the prejudice of another defendant. S. C. post, 208. Semb. Where a defendant disclaims all right, you cannot read his evidence, as a proof of your own right, to the prejudice of another defendant.

Where a mortgagee assigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occasion to bring the original mortgagee before the court, for the assignee, as standing in his place, will be decreed to convey. The heir of mortgagor need not bring the original mortgagee before the court, where he has assigned without the mortgagor's joining.

Glanville versus Payne, April 30, 1740.

Cafe 27.

LORD CHANCELLOR laid down the following rules. Barnard. Chanc. 18.

That where a marriage settlement is executed after marriage, in pursuance of articles previous to the marriage, and the limitations are to the husband for life, to the wife for life, and to the heirs of the body of the husband to be begotten upon the wife, it is executory, and will be carried into strict settlement by this court; otherwise if executed after marriage with-

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GLANVILLE v. PAYNE. out any articles previous to the marriage to direct the uses such settlement (1).

The stat of *H. 8. c. 28. f. 2.* gives a tenant in tail power on to make leases for three lives absolute, but not for 99 years terminable upon three lives (2).

Where a settlement made after marriage, gives an equivalent to the issue, for what they were entitled to under the settlement previous to the marriage, the Court would have dispensed with carrying that before the marriage into execution; but in the settlement made *after* marriage in the present case no equivalent given to the issue, and therefore the settlement *before*, which for the benefit of the issue, must be pursued.

Mr. Serjeant *Barnardiston* has stated the case very fully in *Chancery Reports*, p. 18.

(1) See *Fearne* 61 to 75. the 3d. edit. (2) *Vide Whitlock's case*, 8 Co. 70. a. b

Cafe 28.

Lewellen versus Mackworth, June 23, 1740.

S. C. Barn. Cha. Rep. 445.

A defendant to a bill for the discovery of new matter, must plead or demur, and cannot insist upon it, at the hearing.

A bill of review improper before a decree is enrolled.

The evidence necessary as to finding deeds after a decree is such only as the Court thinks reasonable.

The rule with regard to evidence, is such as the thing to be proved will admit of.

WHEN a supplemental bill is brought for any new matter discovered since the hearing of a cause, before a former decree was signed and enrolled, if the defendant to such bill is able to shew that there is no new matter discovered, must take advantage by plea or demurrer (1), and it is too late to insist upon it at the hearing (2).

Where a decree is neither signed nor enrolled, you cannot bring a bill of review, but a supplemental bill, in the nature of a bill of review (3).

It is not necessary there should be a certain and positive evidence, as to the finding of deeds, after a decree, which, if covered before, would have varied the decree, but such evidence only as the Court thinks reasonable.

There is no rule of evidence to be laid down in this court but a reasonable one, such as the nature of the thing that is to be proved will admit of (4).

(1) *Baldwin v. Mackown*, *post.* 3 vol. 817.

(2) *Jones v. Jones*, 3 vol. 217.

(3) *Standish v. Radley*, *post.* 1 vol. 8
Wortley v. Wortley, *post.* 3 vol. 8
Moore v. Moore, 2 *Ves.* 596.

(4) *Villiers v. Villiers*, *post.* 71.

Atkinson versus Turner, at the Rolls, June 30, 1740.

Case 29.

I Give two thirds of three eights of my joint stock and trade to my grandson *Richard Turner*, provided he shall attain his full age of 21 years, but if he die before 21, then remainder over to the plaintiffs. *Richard Turner* died before 21.

S. C. Barn. Cha. Rep. 74.

A testator gives a part of his stock in trade to R. T. provided he at-

tains 21, he dies before that age, the administrator of R. T. is not entitled to the intermediate profits from the testator's to the infant's death (1).

The question was, if the administrator of *Turner* is entitled to the intermediate profits, from the death of the testator to the death of the infant.

The Master of the Rolls. The whole turns upon this, whether this was such an interest as vested during the minority of *Richard Turner*, or whether it was suspended during his minority, and divested upon his dying before 21.

Considering it upon the words of the will, I own I think it a very strong case as a condition precedent, and that the estate could not vest till the infant attained the age of 21.

Nothing is more frequent than a future interest in a chattel; and there is no instance where the Court strains to make it a vested one, till the future time comes *in effe*.

The only difference in the present case is, that this legacy is not properly money, but the partnership and the profits of a trade.

The more general a rule is made the better; and it is very dangerous to run into niceties, to distinguish any particular case from a general rule, as it must necessarily breed uncertainty and confusion.

Nice distinctions to be avoided, for the more general a rule is the better.

(1) See *Heath v. Perry, post.* 3 vol. 102.

Elliot and others versus Merriman, at the Rolls, July 1, 1740. Case 30.

MR. *Thomas Smith*, who had both a real and personal estate, was indebted to several persons, and particularly to the plaintiffs, and, to secure the plaintiffs' debts, he entred into a bond to them, together with one *Godwin*, as a co-obligor.

S. C. Barn. Cha. Rep. 78

T. S. describes all his real and personal estate to G. his heirs, &c. charged with the payment of his

debts; the plaintiffs who are bond creditors never asked for their principal, but receive their interest regularly for 16 years of G. the executor, who during this interval made several sales of the testator's estates; it was held by the *Master of the Rolls*, that the bill brought by the bond creditors shall be dismissed, and a purchaser shall not be disturbed after quiet possession of 16 years.

Thomas Smith, by an introductory clause at the beginning of his will, charges all his real and personal estate for the payment of his debts.

[42]

Then comes the clause upon which the plaintiffs found their claim.

ELLIOT v.
MERRIMAN.

" I devise all my real and personal estate to Mr. *Godwin*, heirs, executors, administrators, and assigns, charged with the payment of my debts."

The testator died in 1724.

Godwin, the devisee, was made sole executor, and proved will; he paid the interest of 5 *l. per cent.* regularly to the plaintiffs upon their bond, till 1730, as it is admitted on all sides nor did they ever seem desirous of their principal; he has in several sales of the testator's estates: first, of his freehold, secondly, of his leasehold; and a third sale of an estate, consisting of part freehold and part leasehold, to *Merriman*. The question upon the whole is brought to this, whether, as the devise of real estate to *Godwin* is not an express devise to sell, but is charged with debts, the vendee in this case takes the estate *onere*, as the vendor did.

The Master of the Rolls was of opinion directing an estate to be sold, does not imply that it must be sold at all events, if debts can be satisfied without.

Subjecting an estate to debts, without giving an absolute power to sell, does not guard the estate from being sold, if it cannot be paid otherwise (1).

Where a man purchases a leasehold estate from an executor, it ceases to be a trust on the land, for where money is wanting an executor must sell.

As to the leasehold estates, they are out of the case; for when a man purchases such an estate from an executor, it ceases to be a trust upon the land, for where money is wanting, an executor must sell; for to entertain a doubt to the contrary, would make it impossible for an executor to raise assets, as no person would venture to buy (2).

Length of time is no favourable circumstance for credit for had they come recently, and prevailed against the purchase he might have had his satisfaction over against the vendor, who was then in good circumstances, for his bankruptcy was many years afterwards.

Where a creditor of a testator accepts of an executor's bond, it is as a new security.

Where the debtor has charged an estate by will with the payment of debts, and the creditor after the death of testator accepts of the executor's bond, it is as a new security, and is as a circumstance to shew that he relies more upon the credit of the executor, than the charge in the will.

[43]

An express devise of an estate to an executor to sell, or a charge for payment of debts without the power, gives him an equal right to do it.

There is no difference between an express devise of an estate in trust, to be sold, and an estate charged in trustees' hands with the payment of debts, without an express power to sell; in either case an executor has an equal right to do it.

General rules ought to prevail, though in the case of creditors themselves.

The court chuse rather to abide by their general rules, than to let in nice distinctions, in order to relieve particular persons, even in the case of creditors themselves.

(1) See *ante* 1 vol. 506.

(2) See *Ever v. Corbet*, 2 P. W. 148. *Nugent v. Gifford*, *ante* 1 vol. 463. and notes. *Mad v. Lord Orrery*, *post*. 3 vol.

235. *Ishel v. Beane*, 1 Ves.

Jacomb v. Harwood, 2 Ves. 265. *v. Booth*, 4 Durn. and East 625. in

Where creditors have so easy a remedy as to bring a bill against a devisee in trust of lands, to compel a sale, when the annual produce is not sufficient to pay debts, they shall not disturb a fair purchaser, who has been in quiet possession for 16 years, of the trust estate; the bill was dismissed without costs, as to those creditors who did not appear to have express notice of the defendant's purchase.

ELLIOT V.
MERRIMAN.

Waltham versus Broughton & contra, July 4, 1740.

Case 31.

THE defendant having been guilty of the grossest fraud that ever appeared before a court, Lord Chancellor decreed, that he should refund the principal money he cheated the plaintiff of, with legal interest till the payment, and to pay costs both of the original and cross bill.

In notorious frauds the court anciently made a defendant pay exemplary costs, but disused from the difficulty of carrying it into execution.

If, said his Lordship, I could make the defendant pay exemplary costs, I would do it; but though it was the ancient course of the court, in notorious frauds, yet it has been disused for some time, from the difficulty of carrying it into execution; but if the practice had been continued down to the present time, I would certainly have inserted in the decree, *Let the defendant pay exemplary costs.*

Pugh versus Smith, July 4, 1740.

Case 32.

WHERE a freeman of London makes a will, a child of such freeman must elect to take by the custom, or by the will, and cannot claim part by one, and part from under the other, and there is no instance to the contrary, for the rule is, you must abide by the will *in toto*, or by the custom *in toto* (1).

A child of a free-man must abide by the will *in toto*, or by the custom *in toto*.

(1) *Morris v. Burroughs*, ante 1 vol. 278. See also if the father only disposed of 404. post. 629. S. C. *Car v. Car*, post. his testamentary part. Cases *supra*.

Huggins versus the York - Buildings Company, July 4, 1740.

[44]

AN administrator of a judgment creditor brought the original bill, and died; the executor of the administrator brought a bill of revivor, which was thought to be wrong, and thereupon another bill of revivor was brought by the same plaintiff, having first taken administration *de bonis non*, &c. to the judgment creditor; the defendant pleaded the bill was for the same matter, and upon this, it was referred to a master to examine whether it was so, who made a special report, that the last bill of revivor is brought by the plaintiff in a different right from what the former was, but does not say it was, or was not, for the same matter.

Case 33.
S. C. Barn. C. R. 83.
S. C. 16 Vin. 368.
S. C. 2 Eq. Ab. 3. pl. 14.
S. C. post 107.
Scmb
A plea of a bill for the same matter over-ruled, where the last was brought in a different right.

D 4

LORD

2 Dec 1752

Winnings & Budden
2 Phillips 705

HUGGINS v.
YORK-
BUILDINGS
COMPANY.

A demurrer must
be good for the
whole, otherwise
as to a plea (1).

LORD CHANCELLOR over-ruled the plea, because it appears that the bill is brought by a person in a different right; but the plaintiff is not entitled to costs upon such dismissal, because the Master's report is special and not general. His Lordship also laid it down that a plea may be good for part, and over-ruled for part, but a demurrer must be good for the whole, or void for the whole.

(1) Earl of Suffolk v. Green, ante 1 vol. 451. Harrison v. Southcote, ante 1 vol. 539.

Cafe 34. Dean and Chapter of Ely versus Sir Simeon Stewart, July 12, 1740.

S. C. Barn. Cha.
Rep. 170. more
fully stated.

The court of
chancery will
not decree a spe-
cific perform-
ance of cove-
nants in dean
and chapter
leases of a long
standing.

An adverse party
may cross-exa-
mine a witness
to the same point
for which he is
produced, but
not to any new
matter.

LORD CHANCELLOR laid down the following rules in this cause.

Where the leases of a dean and chapter are of long standing, and have been continued down to this time without any variation as to the form, they cannot have a decree in this court for a specific performance of covenants for repairs, against the present tenants, but must be left to their legal remedy of an action at law for a non-performance.

Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine, as to the same individual point, but not to any new matter; so in equity, if a great variety of facts and points arise, and a plaintiff examines only as to one, the defendant may cross-examine to the same point, but cannot make use of such witness to prove a different fact.

A copy of an ad-
mittance may be
read though not
signed, where
it is of 30 years
standing.

Lessees under
deans and chap-
ters preserve the
same descriptions
in their leases
since, as they
did before the re-
straining statutes,
for fear of in-
curring the pe-
nalties.

Where the admittance of a copyholder is of 30 years stand-
ing, a copy of such admittance may be read in evidence, and
not necessary it should be signed by the steward of the court.

Deans and chapters, for fear of incurring the penalties of the
restraining statutes, have been careful of preserving the same
description in their leases since, as they did before those statutes;
and possibly at the time of the old leases there might be barns or
ancient buildings, which, after such a length of time, must have
been long since decayed and gone; and therefore it would be
hard to decree the present defendant to deliver up, at the expi-
ration of his lease, the premises with such buildings upon
them, when there is not the least proof, that they were in being
at the making of the lease.

An agreement

Where there is an agreement with relation to a dean and
estate, executed by the dean, for himself and chapter,
it shall bind the chapter notwith-

Kemys versus Rufcomb, July 1740.

Case 35.

A Bill was brought against the representatives of a judgment creditor, for entering satisfaction, as it is of 42 years standing, and presumed to be paid from the length of time: his Lordship dismissed the bill with costs; for where a judgment is still standing out, and there is no satisfaction entered upon record, this court will not, merely upon the presumption from length of time, decree it to be satisfied, especially when the statute for the amendment of the law, 4 Ann. c. 16. s. 12. allows you to plead payment at law, as it is an old judgment.

Where a judgment is still standing out, and no satisfaction entered, this court will not, merely upon a presumption from length of time, decree it to be satisfied.

Briggs v. Pinner
173 Mac. 624b

Newstead versus Johnston, July 15, 1740. (1).

Case 36.

S. C. Barn. C.R.

GRACE Lawson, by her will, gave several legacies to her children; and then directs 1000*l.* to be taken out of her partnership stock in trade, and settled in strict settlement on her son; the residue of her partnership stock she gave to a trustee, with very particular directions as to the management, in trust for the separate use of her daughter Elizabeth Johnston, who was a feme covert, and appoints Mrs. Johnston her executrix, but makes no disposition of the surplus. The bill is brought by Reynold Newstead and Alice his wife, who was a daughter of the testatrix, against Allen Johnston and his children by Elizabeth, the other daughter, to have the surplus distributed.

94.
C. L. gives the residue of her stock in trade in trust for the separate use of her daughter, and appoints her executrix of her will, but makes no disposition of the surplus. This is not a legacy, but an exception out of the stock the testatrix had given

to her son, and does not exclude the daughter from the surplus (2).

LORD CHANCELLOR,

[* 46]

The giving several other legacies to the rest of the children, is no rule that the child who is left executor should have the residue; it is impossible to reduce all the cases, as there is so great a contrariety between them, to one general rule; but, as the law stands now, where a person appoints one executor, it is giving him the residue, unless there is a particular legacy; the same rule holds in the ecclesiastical court, except there be a strong and violent presumption that the executor was not to have the residue. 2 Vern. 648. Lady Glanville et al' versus the Dutchess of Beaufort (3).

Where a person appoints one executor, 'tis giving him the residue, unless he has a particular legacy; and the same rule holds in the ecclesiastical court.

Ever since the case of Foster and Munt, 1 Vern. 473. it is settled, that wherever a legacy is given to an executor for his care and pains, he is, as to the residue, a trustee only for the next of kin, for it would be absurd to give one a legacy for his care and pains in managing the estate for himself (4).

A legacy given to an executor for his care and pains, makes him, as to the residue, a trustee only for the next of kin.

(1) Reg. Lib. B. 1739. fol. 441.

(2) Griffith v. Rogers, Prec. Cha. 231.

Hjkins v. H. skins, Prec. Cha. 263. Jones v. H. fcomb, Prec. Cha. 316. Granville

v. Beaufort, 1 P. W. 114. Lawson v.

Lawson, 7 Bro. P. C. 511.

(3) 1 P. W. 114. S. C. See Farring-

ton v. Knightly, 1 Cox's P. W. 550. n. 1.

(4) 2 Vern. 676. S. C. Davers v.

Davers, 3 P. W. 43. J. ssin v. Brewitt,

Bunb. 112. Scutbot v. W. uson, post.

3 vol. 228. Andrew v. Clark, 2 Vef.

162.

NEWSTEAD v.
JOHNSTON.

This reasoning in subsequent cases has been carried further where general legacies were given without assigning any particular reason, yet held to be in exclusion of the residue, for a testator's giving a person part of his estate, is an implication that he did not intend him the whole.

Mr. *Vernon* told Lord *Macclesfield*, that he took this point to be as well established, as that an estate to a man and his heirs is a fee-simple, which his Lordship mentioned in the case of *Firington v. Knightly*, 1 *Wms.* 551.

There is no sort of presumption to be admitted from nearness or remoteness of kin in the person who is left executor, that the testator did or did not intend him the residue (1); tho' in the case of *Ball and Smith*, there was a distinction in favour of wife (2).

The present case falls directly within the reasoning of *Griffith* and *others*, and the Dutcheſs of *Beaufort*, in the House of Lords, *December* 12, 1710. Giving a share in the partnership stock to S. in trust for the wife, is consistent with intending her the residue; for had it not been done in this manner, it must have sunk in the residue, and the husband by this means would have been intitled to it; consequently I can never say an implication arises from hence, that the testator has excluded the executrix from the benefit of the surplus, for implications must flow from natural and necessary consequences; this was not a legacy but an exception out of the legacy she had given of the partnership stock to the son.

[47]

A legacy in trust equally excludes an executor from the residue.

A gift of the residue to an executor for life, implies he shall have it for no longer a term.

The giving a legacy directly to B. or giving it to A. in trust for B. is one and the same thing, and equally excludes the residue.

Where a residue is given to the executor for life (as in the case before the Master of the Rolls), it implies a negative that he shall not have it for any longer term, and distinguishes from the present case, for here is no express devise of the residue.

(1) *Randall v. Bookey*, 2 *Vern.* 425. *Mar-* (2) 2 *Vern.* 675. S. C.
tin v. Rebow, 1 *Bro. Cha. Rep.* 154.

Barker v. Barker.
2 *Sims.* 249.

Case 37. *Sumner versus Partridge*, at the Rolls, July 25, 1740.

Tenancy by the curtesy must come out of the inheritance, and not the freehold.

A Devise to A. and her heirs, and if she die before her husband, he to have 20*l.* a year for life, remainder to go her children, the wife died before the husband.

It is a rule, said the court, in the case of a tenancy by curtesy as well as in a tenancy in dower, that the estate must come out of the inheritance, and not out of the freehold.

A tenancy by the curtesy is a continuation of the inheritance in the husband.

A tenancy by the curtesy, and a tenancy in dower are exceptions out of the inheritance, and a continuation of the inheritance for a certain time in the husband, which would otherwise have ceased.

A tenancy by the curtesy must arise out of the inheritance, which must vest in the wife, and there must be a possibility of its descending upon the children; now they take here by virtue of the remainder over, not by descent from the mother, and there is no difference between making an estate of inheritance to cease in the wife the moment she dies, and to arise in the children, and a jointenancy.

Neither a tenant in dower or curtesy can entitle themselves to an estate in dower, or curtesy, where the children who are left cannot possibly take an inheritance, for the moment of time the husband takes as tenant by the curtesy, the inheritance must descend upon the children, and therefore it is impossible, in the present case, to maintain the father is tenant by the curtesy (1).

SUMNER v. PARTRIDGE. There can be no tenancy by the curtesy where the children take by virtue of a remainder over, and not by descent from their mother. To entitle the husband to be tenant by the curtesy, the inheritance must descend upon the children.

(1) *Paine's Case*, 8 Co. 34. b. Co. Litt. 29. b.

Biggleston versus Grubb, July 16, 1740. *Chancery Case 38.*

A Bill was brought for a legacy of 500 l. by a husband, in the right of his wife, given her under the will of her father, notwithstanding he had in the father's life-time received 500 l. as a portion.

Parol evidence was admitted to shew the father gave the 500 l. to the husband in full of what he intended his daughter under his will (2).

Where a plaintiff is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his suit, it is an aggravation, and the bill shall be dismissed with costs. And his Lordship decreed accordingly.

500 l. given in a testator's life-time is a satisfaction for the same sum left in his will (1).

A bill dismissed with costs, for refusing a fair offer of accommodation.

(1) *Irod v. Hurst*, 2 Freem. 224. *Hale v. Aldon*, 2 Cha. Rep. 35. *Hofkins v. Hofkins*, Pre. Cha. 263. *Hartop v. Whitmore*, Prec. 541. 1 P. W. 681. S. C. *Jenkins v. Powell*, 2 Vern. 115. *Scotton v. Scotton*, 1 Stra. 235. *Farnham v. Philips*, post. 215. *Tapper v. Chalcraft*, post. 492. On the general doctrine of Satisfaction, see *Belasis v. Urbwat*, ante 1 vol. 426. n. 2.

(2) See *Roswell v. Bennet*, post. 3 vol. 77.

Henley versus Philips, July 1740.

Case 39.

THE rules of evidence in this court as to witnesses are exactly the same as at law (1).

If witnesses are dead, who have attested a deed, it is not sufficient that you prove the hand-writing, but you must likewise shew they are dead.

attested a deed, you must prove him to be so.

Rules of evidence the same in law and equity. Where a witness is dead who

(1) See *Villiers v. Villiers*, post. 71.

Where

HENLEY v.

PHILIPS.

Where an attesting witness has lived abroad, a strict proof of his death is required, otherwise where he has lived constantly in *England*.

If a trustee, merely to have a point relating to his private interest determined, brings the *cestui que trust* before the court, he shall pay the whole costs of the suit.

[49]

A power in a feme covert to dispose by a writing purporting to be a will, does not give it the authority of one in the ecclesiastical court, and the husband must be examined to his consent before it can be proved.

Where a person has lived abroad for some years, after attesting a deed, there must be a strict proof of his death; otherwise where the witness has lived constantly in *England*, from the time of his subscribing his name to the day of his death; there a slight evidence of his death is sufficient, especially where the person who proves his hand knew him intimately, and swears that he believes him dead; in such a case, the court will not expect such nicety, as that a certificate of his funeral should be produced.

Where a trustee is merely a trustee, and there is any act to be done by him, it is very commendable in him to be cautious, but where he has a private interest of his own separate and independent from the trust, and obliges *cestui que trust* to come into this court, merely to have the point relating to his private interest determined at the expence of the trust; this is such a vexatious behaviour in him, that for example's sake he will be decreed to pay the whole costs of the suit.

Though a feme covert has a power of disposing of a sum of money, or any other thing, by a writing purporting to be a will, yet, after the wife's death, the proving it in the spiritual court will not give it the authority of a will, but it will be still considered as an instrument only, or an appointment of such sum or other thing in pursuance of the power; and before it is proved in the commons, as a testamentary conveyance, the husband ought to be examined there, as to his consent, nor till then will it have the effect and operation of a will (1).

(1) See *Ross v. Ewer*, post. 3 vol. 160.

Case 40.

Lock versus Bennet, July 17, 1740.

Where there are mutual demands, a defendant upon an action at law may as well set off upon 5 Geo. 2. the bankrupt act, as in common cases under 2 Geo. 2. (1).

WHERE there are mutual demands between a creditor and a bankrupt under the clause in 5 Geo. 2. ch. 30. sect. 29. in which are these words, *no more shall be claimed and paid than appears to be due, on either side, upon a balance of accounts stated*: The Master of the Rolls was of opinion, that upon an action at law the defendant might set off his demand against the plaintiff, as is done in other cases by virtue of the statute of 2 Geo. 2. ch. 22. sect. 13. and 8 Geo. 2. ch. 24. sect. 6. and that there is no occasion to come into a court of equity, to pray an injunction to a suit at law, and that the plaintiffs at law may account.

(1) See *Ridout v. Brough*, Cowp. 133; 135.

Berrisford versus Milward, July 18, 1740.

Cafe 41.

A Mortgagee was present when the mortgagor was in treaty for the marriage of his son, with the father of *A.* the son's intended wife, and the lands incumbered being agreed to be settled upon this marriage to the husband for life, to the wife for life, remainder to the issue male and female, it was not opposed by the mortgagee, but he fraudulently concealed his mortgage, and at the same time privately assured the father of the son, that he would trust to his personal security; it was decreed that the son, and his wife, and the issue of this marriage, shall hold the lands quietly and peaceably against the mortgagee and his heirs.

S. C. Barn. Cha. Rep. 101. Allen
Where a mortgagee was present whilst a mortgage was in treaty for his son's marriage, and fraudulently concealed his mortgage, the Court decreed the son, the wife and the issue, to hold the lands against the mortgagee and his heirs (1). *5 H. 272*

against the mortgagee and his heirs (1).

The mortgagee was directed to assign his mortgage to trustees, the one to be named by the son, and the other by himself, to attend the several limitations contained under the marriage settlement; and in case the plaintiff dies without issue of the marriage, or the estates limited to the issue of the marriage determine, then the parties were at liberty to apply to the court for further directions: the injunction to stay the mortgagee's proceedings at law was made perpetual, and he likewise was ordered to pay the expence of the assignment to the trustees.

[50]

(1) The reader is referred to the cases cited in the note to *Mogatta v. Murgatroyd*, 1 Cox's P. W. 394.

Marfb versus Howe, July 18, 1740.

Cafe 42.

WHERE there is a variance between the original will and the probate, the cause must stand over, and the parties are at liberty to apply to the spiritual court for amendment; and, if they see occasion, to make the proper alterations in the probate.

Where a probate differs from an original will, there must be an application to the spiritual court to amend.

July 18, 1740.

Cafe 43.

UPON re-hearing a cause which was originally heard before the Chancellor, it must be opened as a case.

A cause on re-hearing must be opened as a case.

Exceptions ex parte Halsam, July 24, 1740.

Cafe 44.

IF a wife cannot in conscience consent to such an answer as is drawn up by the husband, she is not obliged to submit to it; but upon application to the court, she may be considered as a separate person, and will be allowed to answer distinct and independent from the husband.

A wife whose conscience is hurt by the answer drawn up by the husband will be allowed to answer distinct from him.

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D

If

Ex parte
HALSAM.

Where a husband by menaces prevails on a wife to put in an answer, he may be punished for a contempt.

If a husband insists that his wife put in an answer contrary to what she believes is the fact, and by menaces prevails upon her to do it; this is an abuse of the process of the court, and he may be punished for the contempt.

Case 45.

Levin versus Okeley, July 26, 1740 (1).

Where an executor is also the trustee for payment of debts, the assets shall still be equitable and not legal, and the creditors must be paid *pari passu*.

THERE was a devise to trustees for the payment of debts and the said persons were made executors; the assets, said the court, shall notwithstanding be equitable, and not legal, and all the creditors must be paid *pari passu*. There are cases *Vernon's Reports*, in which it is held, that where trustees are made executors, (*vide* *Girling v. Lee*, 1 *Vern.* 63, &c.) debts shall be paid in a course of administration; but the modern resolutions have been otherwise (2).

(1) In *Silk v. Prime*, cited 1 *Bro. Cha. Rep.* 138. the Lord Chancellor said, that he had examined this case with the Register's book, and found it correct as to the point here mentioned to have been determined.

Preced. Cha. 408. *Spencer v. Biffyn*, p. 291. *Newton v. Bennet*, 1 *Bro. Cha. Rep.* 135. *Silk v. Prime*, 1 *Bro. Cha. Rep.* 138. in note *Barker v. Boucher*, *Bro. Cha. Rep.* 140. in note. *Batson Lindegreen*, 2 *Bro. Cha. Rep.* 94. &

(2) So *Hickson v. Witbam*, *Finchb.* 196. *Anon.* 2 *Vern.* 133. *Challis v. Casborn*,

Blatch v. Wilder, ante 1 vol. 420. note

[51]

Case 46.

Mackworth versus Clifton, at the Rolls, July 31, 1740.

The statute of limitations may be pleaded to the debt, but not to the discovery when the debt was due.

THE statute of limitations cannot be pleaded to the debt very when the debt was due, though it may to the debt itself, because, by the defendant's setting forth when the debt commenced, it will appear to the court, whether the six years are incurred according to the statute.

Case 47.

Ashurst versus Eyre, Easter Term, 1740.

An administrator, though insolvent, must be a party to a bill for discovery of assets.

A Bill for a discovery of assets was dismissed (1), upon a plea that the administrator was not a party, though it was fact not disputed, that he was an insolvent person.

(1) See *vide* S. C. post 3 vol. 341. corrected.

Case 48.

Plunket versus Penfon, at the Rolls, July 31, 1740.

S. C. post. 290. *Semb.*

A Bill, said the court, so far as it is not contradicted by plea, must be taken to be true.

A plea, for want of proper parties, is a plea in bar, and good to the whole bill, as well to the discovery as to the relief (1).

(1) *Hanne v. Stevens*, 1 *Vern.* 110. *Sangosa and the East India Company*, 2 *Ab.* 170. vi. 28.

3. A plea that the bill is only brought against the representatives of the real estate, whereas it ought to be likewise against the representatives of the personal estate; such a plea ought to be allowed, whatever reason there may be to suspect it is put in for delay, that the rule of the court may be uniform.

**PLUNKET V.
PENSON.**
A plea for not
bringing the re-
presentatives of
the personal
estate before the
Court allowed,
for delay merely.

In bills of discovery, the Court said, you should make every person a party who is necessarily to be made so, that you may not multiply suits improperly; at law, indeed, if you was to join the heir and executor in an action, they might demur to your action, but in equity you may join them (1).

At law, if you join the heir and executor in an action they may demur, otherwise in equity, for every person must be made a party, who is necessarily so.

A bill of discovery of real assets may be brought against an heir, in order to preserve a debt, without making an administrator of the personal estate a party, where you suggest that the representation is contesting in the ecclesiastical court, and there a plea for want of parties would not be allowed.

Where the representation is contesting in the spiritual court, you may bring a bill for discovery of assets against the heir, without making an administrator a party.

(1) *Knight v. Knight*, 3 P. W. 333.

Lunatick Petitions, August 4, 1740.

[52]

Cafe 49.

THE act of parliament that empowers justices of peace to take care of lunaticks, upon complaint made to them of any outrages committed, relates to vagrant lunaticks only, who are strolling up and down the country, and does not extend to persons who are of rank and condition in the world and whose relations can take care of them properly, by applying to this court, as is usual in cases of lunacy (1).

Vagrants only, and not persons of rank, are within the act that empowers justices of peace to take care of lunatics.

A person's keeping a commission of lunacy by him for several years, without ever putting it in execution, is of very dangerous consequence, as it may be made an improper use of in many respects, particularly to terrify and distress the person against whom it issues; and therefore, for these reasons, and it being likewise a contempt of the court, the commission was discharged with costs, and the petition also.

A commission of lunacy kept back for several years, without putting it in execution, is a contempt of the court, and will be discharged with costs.

(1) See *Stat. 17 Geo. 2. c. 5. s. 20, 21.*

Morret versus Paske, October 16, 1740.

Cafe 50.

A Creditor by judgment, in 1698, for 600*l.* in the year 1707, comes to an account with the conusor, and settles the remainder due upon the judgment at 420*l.* and then takes a mortgage in fee for that sum, as a collateral security to the judgment: one *Saunders*, an attorney, in 1716, takes an assignee at

Lancaster v. Eon.
 1. Phillips 359.
 Tyler v. Webb
 6. Beaver.
 552.

Lytle Mages
2 Mon: (D. V. 2e.)
328.

MORRET V.
PASK.

assignment of this mortgage, in which there is a recital, that 90*l.* the consideration of the assignment, was then the full worth of the estate; and the assignment likewise was made at a time when there was a suit depending between particular creditors upon several other estates of the mortgagor (the late Mr. John Bennet) in conjunction with judgment creditors at large, and the representatives of Bennet. Saunders was in possession too of another mortgage, in 1688, upon the same estate as was subject to the judgment in 1698, and the mortgage in 1707.

LORD CHANCELLOR,

Saunders shall not be allowed to tack the two mortgages together, viz. that in 1688, and the other in 1707, so as to defeat intermediate incumbrancers, between the years 1688 and 1698, and yet the mortgage in 1707 shall have relation back to the judgment in 1698, and, by consolidating them together, shall intitle Saunders to receive the sum due upon that judgment prior to creditors after the year 1698, but as to money reported due since the mortgage in 1707, Saunders is to be paid only in priority to creditors subsequent to 1707 (1).

[53]

None but a *bonâ fide* purchaser of a puny incumbrance, without notice of intermediate ones, can tack it to a prior.

The rule of the court as to prior incumbrancers taking in a subsequent one, so as to tack it to the prior, is where he is a *bonâ fide* purchaser of the puny incumbrance, without notice of intermediate ones, but here the puny incumbrance was bought in while there was such a *lis pendens*, as will make Saunders a purchaser with notice (2).

The words in the recital of the assignment of the mortgage in 1716, that 90*l.* the consideration money, was the full worth of the estate, at that time, naturally implies that there were other intermediate incumbrances, and therefore to give Saunders the advantage of tacking both mortgages, would be contrary to his own intention, for, at the time he took the assignment of this puny incumbrance, he must know the estate was worth no more, from the very words of the recital.

A prior mortgagee, who has an assignment of a third mortgage as a trustee only, cannot tack the two mortgages together, to the prejudice of intervening incumbrancers.

If a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he shall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers; if this was permitted, a mere stranger purchasing the third mortgage, by declaring he bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers.

A mortgage may be tacked to a judgment (3).

The reason why a mortgage may be tacked to a judgment, is this, because the judgment creditor, by virtue of an elegit, may bring an ejectment, and hold upon the extended value,

(1) *Reg. Lib. B.* 1739. fol. 435.

(2) *Casou v. Round*, *Proc. Cha.* 226. *Goddard v. Complin*, 1 *Cha. Ca.* 119. *Anon.* 2 *Cha. Ca.* 35. *Brace v. Marlborough*, 2 *P. W.* 495.

(3) *Brace v. Marlborough*, 2 *P. W.*

492. See *Mathew v. Cartwright*, *post.* 2 vol. 347.

and as he has the legal interest in the estate, the Court will not take it from him; but this rule holds only where the same person has both judgment and mortgage in the same right, and not where he has the judgment in his own right, and the mortgage in another right, as a trustee only.

MORRETT V.
PASKE.

Where there is a prior mortgagee, who has a puisne incumbrance, a second mortgagee shall not redeem the prior, without redeeming the puisne at the same time; and the reason is, because the legal estate is in the first mortgagee, and this court will not take away that benefit from him, provided he had no notice of the second at the time he bought in the puisne one.

A first mortgagee has the legal estate, and if he has a puisne incumbrance, a second mortgagee shall not redeem the prior, without redeeming the puisne at the same time.

ing the puisne at the same time.

Where a prior incumbrancer, by mortgage, judgment, or statute staple, has a bond likewise from the mortgagor, the mortgagor, in his life-time, may redeem the mortgage, &c. without paying off the bond debt (1); otherwise as to the heir at law, because the moment he redeems the estate, it shall be assets in his hands, and for this reason, the Court compels him to discharge the bond, as well as the mortgage (2).

Where a mortgagee has a bond likewise from the mortgagor, the heir must discharge the one as well as the other.

Where there are several incumbrancers upon an estate, as is the present case, and the prior incumbrancer has a bond likewise, he cannot insist upon being paid both, which would be a prejudice to the puisne incumbrancers; but his bond shall be postponed to all other incumbrancers, whether by mortgage, judgment, or statute staple; for he has not the same equity against a puisne incumbrancer, as against an heir at law, who is liable in respect of assets (3).

[54]

Where a prior incumbrancer has a bond likewise, it shall be postponed to all other incumbrances, whether by mortgage, judgment, or statute staple.

An agent, trustee, heir at law, or executor, purchasing a puisne incumbrance, as against another incumbrancer, shall be paid no more than what he gave for this incumbrance; otherwise as to a prior creditor, who, *bonâ fide*, buys in a puisne incumbrance, tho' he did not give the full value for it: the rule is laid down generally indeed by Lord Chancellor Jefferys, in the case of *Williams v. Springfield* (4), as well with regard to creditor and creditor, as to trustees, heir at law, or executor; but I cannot say, that I remember any decree in this court, subsequent to this case, where it has been laid down as a general

A prior creditor who buys in a puisne incumbrance, though he did not give the full value, shall be allowed the whole, otherwise as to a trustee, agent, heir at law, or executor.

(1) *Cballis v. Cefborn*, *Proc. Cha.* 407. *Anon.* 2 *Ves.* 662. *Coleman v. Finch*, 1 *Cox's P. W.* 776. n. 1. *Archer v. Smart*, 2 *Sra.* 1107. *Contra*, *Baxter v. Manning*, 1 *Vern.* 244.

(2) *Shuttleworth v. Laywick*, 1 *Vern.* 245. *Coleman v. Finch*, 1 *P. W.* 775.

Powis v. Corbet, 20. 3 vol. 556. *Troughton v. Troughton*, 1 *Ves.* 87

(3) *Lowthian v. Haffell*, 3 *Bro. Cha. Rep.* 162.

(4) 1 *Vern.* 476. *S. C.* See also *Baker v. Keller*, 3 *Cha. Rep.* 23. *Phillips v. Vaughan*, 1 *Vern.* 335. *Darcy v. Hall*, 1 *Vern.* 49. *Anc.* 1 *Salk.* 155.

* *Per Cur'*: where there are subsequent incumbrances or creditors in the case, there a man that buys in a prior incumbrance shall be allowed only what he really paid, tho' there was, in truth, a greater sum due. *Williams v. Springfield*, 1 *Vern.* 476.

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PASKE.

rule, but has been much more narrowed since, and holds only, as I observed before, with regard to agent, trustee, heir at law, or executor.

Cafe 51. *Partriche* versus *Powlet*, upon the Master's special Report,
October 17, 1740.

S. C. ante 1 vol.
467. S. C. post.
383.

Edwards
Chambers
De C. & S. vol.
15

MRS. *Sarah Ward*, previous to her marriage with Mr. *Partriche*, was intitled to a moiety of personal estate, amounting to 5300*l.* with her sister Mrs. *Powlet*, in jointtenancy, being the estate of their sister *Mary Ward*, deceased; by the marriage-settlement, the real estate only is conveyed, for what relates to her personal estate, depends merely upon a recital in the deed, which is nothing more than that she shall enjoy the 5300*l.* to her separate use, and a covenant on the part of the husband, that she shall enjoy it quietly, &c. then come these words, *for want of issue of her own body*, it shall go to the next of kin of her own family (1).

The single question was, Whether the jointtenancy between Mrs. *Sarah Ward*, who is dead, and her sister Mrs. *Powlet*, in the estate of *Mary Ward*, is severed in the whole, or in part?

LORD CHANCELLOR,

[55]
An actual alienation only can sever a jointtenancy; a declaration of one of the parties that it shall be severed, is not sufficient.

This is not a severance; for, *first*, here is no agreement for this purpose; *secondly*, if no agreement, then there must be an actual alienation to make it amount to a severance (2); the declaration of one of the parties that it should be severed, is not sufficient, unless it amounts to an actual agreement; and here is nothing in the marriage-settlement which amounts to an alienation, either in law or equity; for the real intention was to preserve the right of the wife as it was, so that her property may not be altered by the interposition of the husband; and, for any thing that appears to the contrary, it might likewise be intended to preserve the right she might have of survivorship, upon Mrs. *Powlet's* dying before her.

There is, besides, another reason, the other jointtenant was no party to the deed.

The only thing that could give the least colour to the supposition of jointtenancy are these words in the marriage-agreement, *for want of issue of her own body*, then it shall go to the next of kin of her own family.

But I do not think they are sufficient to make the issue of her body purchasers, or to give them a right to come into this court as purchasers, to have the agreement carried into execution in their favour; if it had, I should have inclined to think it a severance; but, notwithstanding these words, it still leaves it at large, and absolutely at the wife's disposal.

(1) It does not appear from the Register's Book, how this settlement was framed. But see the case cited more fully, ante 1 vol. 467.

(2) See *Ireland v. Rittle*, ante 1 vol. 542.

A jointenancy is undoubtedly no favourite (1) of a court of equity, tho' otherwise at law; but, in the present case, here is no pretence of an alienation, either in law or equity. *Moyse v. Gyles*, 2 Vern. 385.*

Alienatio rei præfertur juri accrescendi, is a maxim in equity; but then it must appear to be an actual alienation, and not from inference and implication only, without any express declaration of the parties.

**PARTITION
v. POWLET.**
A jointenancy a favourite at law; otherwise in a court of equity. A maxim in equity is *alienatio rei præfertur juri accrescendi*.

(1) *Rigden v. Vallier*, 2 Ves. 258. post. 3 vol. 734, 735. S. C.

* *Per Cur'*: The plaintiff's husband and defendant had enjoyed a church lease in moieties, under an agreement there should be no benefit of survivorship. Upon the last renewal, the lease was taken in both their names, and no express agreement against survivorship. The plaintiff's husband being sick, by deed assigned his moiety of the lease to his wife, and by his will devised it to her. The grant to the wife is void, and the devise will not sever the jointenancy. *Moyse v. Gyles*.

Lucas versus Seale, October 17, 1740.

[56]
Case 52.

LORD CHANCELLOR said in this case, where there are several executors, and one of them is indebted to the testator, for which he had given a security by way of mortgage upon his estate, if the co-executors are apprehensive that he is insolvent, and that the estate may prove a deficient security, bringing a bill against him to foreclose is improper, because the testator having made him an executor, gives him an interest in the mortgage; the other executors should have brought a bill for sale of the estate (1).

Where one executor is indebted to the testator by mortgage, if the co-executors are apprehensive he is insolvent, they should bring a bill against him for sale of the estate; to pray a foreclosure would be improper.

(1) *Reg. Lib. B.* 1739. fol. 430.

The Case of the *York Buildings Company*, October 24, 1740.

Case 53.

LORD CHANCELLOR said, an account between the King and a subject, cannot be taken in any case in this court, but in the Exchequer only.

Where the companies are obliged to make calls, this court will not decree them to make such a call, upon a bill brought by a creditor for that purpose, in favour of that particular creditor, unless under very extraordinary circumstances.

An account with the King can be in the Exchequer only.

This court will not decree publick companies to make calls in favour of a particular creditor.

Wallis versus Hodgison, October 24; 1740. Upon Exceptions.

Case 54.

LORD CHANCELLOR said, it had been determined over and over in this court, that you must shew the person to be of sound and disposing mind, where a will is to be established as to real estate, and especially if there are infants in the case; proving it to be well executed, according to the statute of frauds and perjuries, is not sufficient (1).

When a will is to be established, the testator must be proved to be of a sound and disposing mind.

(1) Vide *Harris v. Ingledeu*, 3 P. W. 93.

Abrams v. Winsbury
1. Russell 526.

WALLIS v.
HODGKINSON.

If, said his Lordship, they could have produced evidence on the part of the plaintiff, of any act having been done under the will relating to the real estate, he would have dispensed with the rule, being a mere matter of formality.

Godolphin versus Abingdon, October 27, 1740.

Cafe 55.

A man cannot by any form of conveyance whatsoever raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, so as to prevent the reversion from being assents to satisfy the son's debts (1).

WHERE, said LORD CHANCELLOR, a limitation is A. for life, to his wife for life, to trustees to prefer contingent remainders, to the first and every other son in tail remainder to his own right heirs; it will be absurd to say, that by a conveyance of lands, or by use, or by devise, the last limitation shall make the right heirs purchasers, and by that mean prevent the reversion from being assents to satisfy the son's debts for according to the doctrine laid down in the case of *Cund* and *Clerke, Hobart* 29. the limitation to the right heirs will be but a reversion, and will vest also in the son; for it is a positive rule, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, by any form of conveyance whatsoever. The same case is reported in *Moore* 86 but the point is wrong stated.

(1) See *Kynaston v. Clark, post.* 204. 249.

Cafe 56.

Phipps versus Annesley & contra, October 27, 1740.

A testator gives his only daughter the sum of 3000*l.* at her age of 18, or marriage, and that the trustees shall levy and raise by mortgage or sale of his lands, together with his personal estate, as much as will pay the 3000*l.* but that it shall not be raised till 18, or marriage, out of the before mentioned estate or land, that it may not be a debt in his personal estate. Lord Hardwicke held that the personal estate was excepted, and that the 3000*l.* is a charge on the real estate.

THE only question in this case of *Phipps* and *Annesley* was whether 3000*l.* given under the will of *James Earl Anglesea* to his daughter, shall come out of the personal estate or whether it is expressly exempted from the payment of it the will sets out in general words, "As to my worldly estate with which it has pleased God to bless me, (and then it cites several manors, lands, &c.) I devise them in trust that the payment of all my just debts, and all my legacies, and the residue to my nephew, *Arthur Annesley*. Item, I give and bequeath to my only daughter *Catherine*, the sum of 3000*l.* (over and above the 12,000*l.* which is conveyed to her under my marriage-settlement) at her age of 18, or marriage; and that the trustees shall levy and raise by mortgage or sale of his lands, together with his personal estate, as much as will pay the 3000*l.* but that it shall not be raised till 18, or marriage, out of the before mentioned estate or land that it may not be a debt upon my personal estate. There are three different clauses besides in the will, that conclude with these words, "that his lands are devised to pay his debts, and all his legacies, and that his personal estate shall not be sufficient."

LORD CHANCELLOR,

Though this objection comes extremely late after two decrees it must have its weight, if, as the plaintiff insists, it be rightly founded.

It is certainly the rule of the court, that personal estate is the natural and proper fund to be first applied to the payment of debts, unless there are express words to exempt it (1).

PHIPPS v. ANNESLEY.
Personal estate is the natural fund for payment of debts.

I am of opinion, however inaccurately penned, that the intention of the testator, in the present case, was to exempt his personal estate from the payment of this 3000*l.* for in the clause by which he bequeaths this sum to his daughter, he takes notice that there was the sum of 12,000*l.* already charged upon the real estate.

His design must have been to give her this as an additional fortune, and to connect the two sums together; for where a less sum is given under a will than under a settlement, the rule will not hold, that it shall be taken to be in satisfaction of a greater.

A less sum given under a will than under a settlement, is not a satisfaction of a greater.

It has been objected, that *the before-mentioned estate* must mean the personal estate, personal estate being the last antecedent; and yet it certainly does not, but is set in direct opposition to the personal estate, and the words immediately following, *or lands*, are not disjunctive, as is insisted on, but explanatory rather of his intention, that the 3000*l.* should come out of the real estates charged before with the 12,000*l.*

Where there is a charge upon a personal estate, though it is not immediately payable, yet the person entitled may come into this court, and pray that a sufficient sum may be set apart to answer the legacy when it shall become due (2).

Where a legacy is a charge upon personal estate, this court will set apart a sufficient sum to answer it, though not immediately payable.

This probably was the reason of the testator's inserting the words, *that it should not be a debt upon his personal estate*, that so large a sum as 3000*l.* might not be locked up in the mean time, until the daughter, who was then young, should arrive at eighteen, or be married; and these words, *that it should not be a debt upon his personal estate*, are said indefinitely, and not for a limited time.

Upon the whole, this is one of those cases where by negative words in a will the personal estate is excepted, and therefore the 3000*l.* as well as the 12,000*l.* are a charge upon the real estate only (3).

(1) See *Galton v. Hancock*, post. 434.
439. note *Walker v. Jackson*, post. 625.

(2) *Henth v. Perry*, post. 3 vol. 105. note.
(3) *Reg. Lib. B. 1738. fol. 114. Reg. Lib. B. 1740. fol. 159.*

Ayliffe versus Murray, October 27, 1740.

Case 57.

TWO persons who were both executors and trustees under a will, and one of them an attorney that drew up the will, refused to act in the trust, unless *cestuy que trust* would give them besides their legacies some consideration for acting in the trust; he refused to do it for some time, but at last consented, and ex-

Two persons executors and trustees under a will, would not prove the will, nor suffer the *cestuy que trust* to

obtain letters of administration *cum testamento annexo*, till he had executed a deed, by which he was to give a hundred pounds to one executor, and two hundred pounds to the other, within six months after they had exhibited an inventory. Lord Hardwicke declared the deed was unduly obtained, and decreed that no allowance should be made for the sum of 100*l.* and 200*l.* to the plaintiffs.

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Brown
3. 22.
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Brown
Bl.
D. 13.
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AYLIFFE v.
MURRAY.

Greenlaw

Shirley

Bearson

49

me v. Bingle

2 J. J. 664.

Charles v. Bayly

me v. Labadie

120.

van v. Sheriff

Harv. 512.

executed a deed for paying 100*l.* only, to *Bryan Aylyffe*, one of the trustees, who being an attorney thought some profitable sum might arise out of the will, and therefore asked no more, but to Mr. *Pomfret* the other trustee 200*l.* because, being a lawyer he had not the same advantage with his co-trustee.

This contract was obtained from the *cestuy que trust* only two days after testator's death, but then it was settled by his counsel, at three several meetings for that purpose, before he executed it.

The trust-estate is 1200*l.* a year in value, consisting chiefly of leasehold estates, which the trustees are directed by the will to renew from time to time, besides other necessary trouble.

The 200*l.* to *Pomfret*, and the 100*l.* to *Bryan Aylyffe*, under the contract, was to be paid to them, over and above their legacies, within six months after they shall have exhibited an inventory to the ecclesiastical court, and such payment was to arise out of the dividends and interest which should become due to the defendant.

The bill is brought for a specific performance of the agreement, and for an account.

The principal suggestion of fraud on behalf of the defendant was, that the plaintiff and his co-trustee threatened that they would not prove the will themselves, nor suffer the defendant to take out letters of administration, *cum testamento annexo*, unless he would agree to their proposal, and that this was the sole inducement of the defendant's executing the contract.

LORD CHANCELLOR,

This is a case of very great consequence, and it is incumbent upon the Court to proceed upon wary steps, before they establish such demands.

That a trustee cannot contract with *cestuy que trust*, or purchase part, or the whole trust-estate from the *cestuy que trust*, though for a valuable consideration, but that a court of equity will set it aside, must depend upon circumstances, and is not a general rule.

It is not a general rule to set aside every purchase made by a trustee of a trust estate, but depends upon circumstances (1).

Where a bill prays an account and allowances in that account, a defendant may equally make objections, as if he had brought his cross bill.

If the defendant is right in his objections to these allowance undoubtedly he might have brought his cross-bill to set the aside; but I am of opinion, where a plaintiff brings his bill praying an account against a person, and allowances in that account, the defendant is as proper to make objections as if a cross bill had been brought.

There may be cases where the Court will establish an agreement, made with a trustee for an extraordinary allowance, beyond the terms of the trust.

With regard to the merits, whether upon general grounds a trustee may make an agreement with a *cestuy que trust* for an extraordinary allowance, over and above what he is allowed by the terms of the trust, I think there may be cases where this court

(1) *Vide Whelpdale v. Cookson*, 1 Ves. 9. 326. *Fox v. Macreath*, 2 Bro. Cha. Re *Twinning v. Morrice*, 2 Bro. Cha. Rep. 400. *Norris v. Le Neve*, post. 3 vol. 37. 3

would establish such agreements, but at the same time would be extremely cautious and wary in doing of it.

AYLIFFE v.
MURRAY.

In general this court looks upon trusts as honorary, and a burden upon the honour and conscience of the person intrusted, and not undertaken upon mercenary views; and there is a strong reason too against allowing any thing beyond the terms of the trust, because it gives an undue advantage to a trustee, to distress a *cestui que trust*, and therefore this court have always held a strict hand upon trustees in this particular (1).

This court always holds a strict hand over trustees in respect to extra allowances.

Burger v. Bond
2 Hare 373

If a trustee comes in a fair and open manner, and tells the *cestui que trust*, that he will not act in such a troublesome and burdensome office, unless the *cestui que trust* will give him a further compensation, over and above the terms of the trust, and it is contracted for between them, I will not say this court will set it aside, though there is no instance where they have confirmed such a bargain.

But, in the present case, the proceeding is not so fair and open; for Mr. Ayliffe is an attorney, drew the will himself, and was likely, in the way of his profession, to make a considerable profit of the trust; as there was an account to be settled, a conveyance to be made, and several other things to be done in the law way; and besides, if the legacy was too small, why did not Ayliffe make the objection at the time he drew the will, as the defendant very properly observed, when Ayliffe asked for an additional allowance.

It has been said, that the defendant's brother swearing in his deposition that Ayliffe said, he would hinder Murray from administering, or words to that effect, carried too great a latitude: but I think it very proper; for where a man swears to words, if he is mistaken in any of them, he is perjured, and therefore swearing Ayliffe said, he would hinder Murray from administering or to that effect, was very right, and I have often objected to affidavits for want of them.

Not swearing expressly to words spoken, but adding, or to that effect, is a proper caution in an affidavit.

I consider the case in this light; two trustees are making an ill use of an authority, they had under the will, to extort a reward from a *cestui que trust*; if they had told him, give us a farther reward, or we will renounce, they had acted fairly, and something might have been said in favour of the contract.

[62]

The personal estate was vested in them before probate, and could not be got out of them without an actual renunciation; the real estate likewise vested in them, and could not be taken out of them but by an actual assignment; and, sensible of these difficulties upon the defendant, the plaintiffs would not act, in order to force him into their terms.

This case has been compared to several other cases of fraud, and amongst the rest to marriage-brochage bonds, and not improperly; for the person who has the reward there, has as much trouble as the trustees have here, and the party giving the reward in those cases, full as willing as the defendant in this,

(1) *Robinson v. Pett*, 3 P. W. 251. *Gould v. Fleetwood*, cited in note A. *ibid.* 406.

**ATLIFFE v.
MURRAY.**

and yet the Court always set those bargains aside as unconscionable.

Consider the ill consequences of such a case; suppose should be necessary that a will should be immediately produced, in the case of a widow and children, shall a trustee whom the testator reposed a trust and confidence, and depended upon his honour and kindness, insist upon such hard as to have an unreasonable reward, before he will either the will, or act in the trust?

Therefore, upon the whole, I declare that this deed was duly obtained from Mr. *Thomas Murray*, and decree no answer to be made for the sums of 100*l.* and 200*l.* and both the plaintiff *Pomfret*, and the representative of *Bryan* to pay costs as to so much as relates to the deed, generally reserved.

Case 58.

April 16, 1740, on Exceptions to a Master's Report

Where a deed happens to be lost, you cannot at law read a copy, because you must declare with a *proferat hic in curia*, and therefore you may bring a bill here to be relieved against the accident of the original's being lost.

LORD CHANCELLOR laid it down in this case, where a rent-charge is granted by deed, and the deed happens to be lost, you cannot read a copy in evidence because you must declare with a *proferat hic in curia*, as the defendant is entitled to oyer of the original, so that the plaintiff must either set up a prescriptive title to the rent, from constant and uninterrupted payment, or he must bring his bill to be relieved against the accident of the original's being lost. The same rule holds in the case of a bond; for though a hundred witnesses could prove the substance of it, yet it is no evidence at law, for you must declare upon it, with a *proferat*.

Daniel v. Davies curia (1).

5 Degeu ff. 611.

(1) *See Foot v. Jones*, cited ante 1 vol. *Titty v. Nesbit*, 3 Term Rep. 15
345. *Welmstey v. Child*, 1 Ves. 345. See also *Atkinson v. Leonard*, 3 Es.
Whitfield v. Fauquet, 1 Ves. 393. *Contra Rep.* 218. 224.

[62]

Smith versus Fellows, at the Rolls, October 28, 1740

Case 59.

S. C. post. 377.
If a freeman of London makes a voluntary deed in consideration of love and affection only, and reserves the power over the estate to himself, the property still continues in him, and is subject to the custom.

THE question here was, Whether a freeman of the City of London, who makes a voluntary deed, merely in consideration of love and affection, without any pecuniary consideration, and reserves the power over the estate to himself, is not guilty of such a fraud upon the custom, as will induce this court to set aside the deed.

The deed was in substance as follows.

"Whereas I the said *William Fellows* am desirous to reserve the premises for the benefit and advancement of my son *Richard Fellows* in the world, in case he shall

SMITH V.
FELLOWS.

"tain the age of 21, and be living at the time of my decease,
"over and above what he may be entitled to besides, out of
"my estate, I grant to *Josiah Fellows* and *George Barlow*, a
"term of 99 years in trust to permit me the said *William Fel-*
"lows, the father, to take the rents and profits of the so as-
"signed premisses, for so long of the 99 years term as I shall
"live, and in case the said *Richard Fellows*, my son, at my de-
"cease, shall be at full age, to assign the residue of the term to
"him; but if he shall not be of full age, then the said *Josiah*
"*Fellows* and *George Barlow* shall receive the rents and profits,
"and allow so much as they think proper for his maintenance,
"and the surplus to be laid out by the trustees, or survivor, in
"government securities, for the benefit of *Richard*, when he
"comes of age.
"Provided always, that if the said *Richard Fellows* should
"depart this life, in the life-time of *William*, then all the
"trusts hereby declared to him by this deed, to be void, and,
"in case of his death, be a trust for the other children (in ex-
"clusion of the widow) if they attain the age of 21, and in case
"of the death of all the children before that age, then to the
"next of kin of his own family."

This deed was made in the life-time of the first wife of *Wil-*
liam Fellows.

The bill is brought by the second wife, the widow of the free-
man, who was ignorant of this deed at the time she married,
and likewise by the rest of the freeman's children, to have the
property disposed of by this deed to the eldest son, to be brought
by him into hotchpot, that it may be distributed according to the
custom of *London*.

Master of the Rolls. The case 2 *Lev*. 130. is a stronger than
the present, because there the possession of the term was deliv-
ered pursuant to the assignment, here possession was kept, and
the rents received constantly by the assignor; however, I shall
take time to consider of it. On the 2d. of *November*, 1740, the
cause came on again, and upon the authority of *Cotterel* and *Cot-*
terel, heard before the late *Master of the Rolls*, about six years
ago, his Honor declared the plaintiff, the wife, to be entitled
to her share (1), according to the custom of *London*, and that
the property in these leasehold estates, notwithstanding the deed,
still continued in *William Fellows*, the husband, and of conse-
quence is subject to the custom. *Hall and Hall*, 2 *Vern*. 277.
and *Turner and Jennings* 612. were the cases principally relied
on the determination of this point.*

[63]

(1) See also *Fairbeard v. Bowers*, 2 *Vern*. 202. *Edmundson v. Cox*, 7 *Vin*. 202.
pl. 11.

* *Hall versus Hall*. *Per cur*. If a freeman of *London* absolutely gives away his goods
in his life-time to any of his children, this is good; but if he keeps the deed of gift in
his own power, or continues in possession of the goods, then it is a fraud upon the
custom. 2 *Vern*. 277.

Turner versus Jennings. A freeman of *London* assigns the greatest part of his personal
estate in trust for himself for life, and then for his grandchildren. *Per cur*. This deed
not good against the custom of *London* as to the moiety belonging to the children, but
binding as to the other moiety, which he had power to dispose of, he having no wife.
2 *Vern* 612.

Tyler & Bell.
2 M. & Craig 89.
 Case 60.

Atkins versus Smith, October 29, 1740.

An administration taken out here will not extend to the colonies in *America*, but an agent there, who gets in assets under the exemplification of a probate, is equally chargeable as if executor got them in himself.

IT was said in this cause by LORD CHANCELLOR, that ecclesiastical jurisdictions are limited within their particular district and an administration taken out here will not extend to the colonies in *America*; but if an executor sends over an exemplification of a probate to *Maryland*, or any other colony, the person who is employed as an agent there by the executor, may by letter of attorney from him collect in the effects of the testate and he is chargeable as much as if the executor had got them himself.

Case 61.

Hanbury versus Lord Bateman, October 29, 1740.

The custom of *London* will operate on the orphanage part of a freeman's estate, and he cannot leave it to go in such proportion as he pleases.

SIR *James Bateman*, a freeman of *London*, on the marriage of his daughter *Anne* with Mr. *Western*, gave her a portion of 10,000*l.* which was conveyed to trustees for the benefit of her younger children, if any; if none, to Mr. *Western* his executors, administrators, or assigns, and a jointure was settled in lieu of the portion, and in the deed is this covenant.

“That if the said Sir *James* should by any ways or means give or leave to any of his daughters, other than the said *Anne Bateman*, any sum or sums of money, or other thing for her portion, which should be delivered or conveyed, and which should exceed the value of 10,000*l.* that then he would pay to Mr. *Western*, his executors, &c. so much money, as other estate, as should make his said daughter *Anne*'s portion equal to that of any other sister.”

[64]

In 1708, Sir *James Bateman* died, and his daughter *Anne*'s orphanage share came to 1777*l.* 15*s.* 3½*d.* over and above the 10,000*l.*

In 1729, Mr. *Western* died leaving only two daughters, the wife of the plaintiff Mr. *Hanbury*, and the wife of the defendant *Dominick*.

The 1777*l.* 15*s.* 3½*d.* is in the hands of the defendant Lord *Bateman*, executor of Sir *James*, and this bill is brought to have it in money, or to be laid out in lands pursuant to the covenant.

Sir *James Bateman*'s Will.

“Whereas I am a freeman of the city of *London*, my desire is, that my estate may go, as to one moiety, according to the custom; and whereas I have already advanced my daughter *Anne* with 10,000*l.* my will is, if there should be a deficiency in one moiety of my estate, to make up my other sister's portions' portions 10,000*l.* that then as much as is wanting to make up that sum to each of them, shall be supplied out of the other moiety.”

The statute of the 4 & 5 *Phil.* and *Ma. ch.* 8. which is intitled, An act for the punishment of such as shall take away

maiden

maidens that be inheritors being within the age of sixteen years, or that shall marry them without consent of their parents, was read, to shew that the sister of Mrs. *Hanbury* had forfeited her fortune, by marrying, under the age of 16 years, *Dominick*, a footman in Lord *Bateman's* family, against the will of her relations.

HANBURY v.
Lord BATE-
MAN.

LORD CHANCELLOR,

At the time of making this statute, the jurisdiction in these cases vested in the Court of Star Chamber, but when that court was abolished, the power, as far as it was legally exercised, was taken up by the Court of King's Bench, who have assumed this authority ever since.

Though a husband is convicted of an offence of a criminal kind, yet it does not follow in all cases, that it shall be given against him in evidence in a civil suit.

But in this case I am of opinion, that the conviction of the husband under this statute may be read in evidence against him, because it is used for no other purpose, but to convict him alone within the penalties of the statute; otherwise if offered as to the wife, as it would tend to make her incur a forfeiture of her portion for her life, under the statute, especially as she is an infant, and was no party to the conviction.

I think it may be compared to the cases of disability under the statute of 11 & 12 of *William and Mary*, cap. 4. against papists, in which the court will never suffer a conviction of recusancy to be given in evidence against a third person, but you must prove the facts.

As there was no proper evidence in this case of the marriage, he reserved the consideration of it to another time.

LORD CHANCELLOR,

The great question is, whether the contingency has happened on which the augmentation of *Anne's* portion was to arise.

I am inclined to think the contingency has not happened.

At the time of entering into this covenant, Sir *James* had several children, the plain meaning of this covenant was to prevent Sir *James Bateman* from giving a greater portion out of his estate to one daughter than another.

What is the meaning of these words, *other than that the said Anne Bateman*; does it mean that Sir *James Bateman* should leave his personal estate to go equally among his daughters?

I think it means if he should give more to any one daughter, in preference or in exclusion of any other daughter, then that he should be a debtor for so much to Mr. *Western, &c.*

But he has not done this, for he has left the custom of the city of *London* to operate upon his personal estate.

The covenant is plainly not applied to his personal estate, for the words are, if he shall *deliver or convey*, which more properly and in legal understanding belong to real estate; so that he might have made that equivalent or satisfaction for the inequality out of his lands.

If Sir *James Bateman* had given 15,000*l.* to any other daughter in his life-time, he would have been liable to have been sued by Mr. *Western*, his executors, &c. upon the covenant.

The

The authority which the Star-chamber had in cases under the 4 & 5 *Pb. & M.* relating to the taking away maidens, is now assumed by the court of King's Bench.

A criminal conviction against the husband, cannot in a civil suit be read in evidence against a wife, as it tends to make her incur a forfeiture of her portion.

[65]

A conviction of recusancy cannot be given in evidence against a third person, under the 11 & 12 *W. & M.* but you must prove the facts.

HANBURY V.
Lord BATE-
MAN.

The consequence of the covenant is, that it creates a debt upon his estate, and not a charge upon the orphanage part.

It has been objected, that if he should *by any ways or means give or leave*, will extend to the orphanage share in favour of the plaintiff.

The present case differs greatly from both the cases cited, *Wilcox* and *Wilcox*, 2 *Vern.* 551. *Blandy* and *Widmore*, 2 *Vern.* 709.

[66]

It is not in the power of a freeman of *London*, to leave his orphanage share to go in such proportion as he pleases, but the custom will operate upon that part of a freeman's estate (1).

(1) Bill dismissed. *Reg. Lib. A.* 1740. fol. 13.

Case 62.

Baker and others versus *Dumaresque*, October 30, 1740.

On a motion to prevent the defendant's going out of the kingdom till he has put in his answer, the Court ordered he should give security to abide by the decree that shall be made at the hearing.

A Person largely in debt assigned over all his effects to the hands of the procurator general of the jesuits for the province of *Brazile*, residing at *Lisbon*, and soon after died intestate; the widow refused to administer; the brother, who is next of kin, has applied to the ecclesiastical court here for letters of administration; the creditors have brought their bill for a discovery of assets; the defendant has not yet put in his answer, and is going to *Jersey*, the place of his abode, and to which the process of this court will not reach; the present application is to prevent his going out of the kingdom till he has put in his answer, and likewise to have a receiver of the estate and effects of the intestate beyond sea, appointed by this court for the benefit of the creditors, because the person who is applying for administration lives generally beyond sea; for if he should obtain letters of administration from the spiritual court, to which he is intitled by law, as next of kin, he will get out of the kingdom before the month's time for putting in his answer, allowed him at a former seal by the court, is out.

LORD CHANCELLOR,

Let the defendant, by his clerk in court, give security to be approved of by a master, to abide the decree that shall be made at the hearing of the cause (1).

I would not have restrained the defendant in this case from taking out letters of administration as he is next of kin to the intestate, but upon a motion for a *ne exeat regn.*, I would have made an order that he should not receive himself the estate and effects of the intestate abroad, nor any other person by his order or direction.

A creditor cannot take an assignment of a

bond given by an administrator pursuant to the statute of Distributions, nor will an action lie upon it though assigned for a breach he was indebted to the assignee in the sum of 2000*l.* upon specialty.

(1) *Reg. Lib. A.* 1740. fol. 119.

given

given by an administrator, pursuant to the statute of distributions, to administer faithfully, and to exhibit an inventory, &c. and that an action will not lie upon it, though assigned for a breach that he was indebted to the assignee in the sum of 200*l*. upon specialty, *Vide* 1 *Salk. The Archbishop of Canterbury ver. Wills, Hill. 6 Ann. B. R. p. 316.* cited by Mr. Chute, the plaintiff's counsel, to shew that creditors had no way of restraining the defendant from taking administration, or coming at their just debts, by assigning a breach in the administration bond.

BAKER V.
DUMARESCU.

[67]

Cooke versus Cooke, November 22, 1740 (1).

Case 63.

WHERE the enjoyment of an estate has been so long and are interrupted as this has been, viz. from the year 1719, Courts of law, as well as courts of equity, will make a strong presumption in favour of a possession of 21 years.

presumption

(1) In 1641, *Richard Staniford* devised certain messuages, &c. to *Edward Staniford* in fee, who died in 1663, and the premises descended to his daughter *Anne*, who married *R. Cooke*, the plaintiff's grandfather, who had issue three sons, *Robert* (plaintiff's father), and the defendants *Bernard* and *Edward R. Cooke*, the grandfather, died. *Robert*, the father, died in 1724, leaving *Jane* his widow and administratrix, and plaintiff his heir at law. *Anne*, the grandmother, died in 1737, and thereupon the plaintiff entered as heir at law on all the premises, except one acre conveyed to *Edward* by plaintiff's grandmother and father. The defendants got the title deeds, and set up several old terms created by way of settlement. The plaintiff now brought his bill as heir at law to be quieted in possession, and to have an assignment of the terms (if any) to attend. The defendants by their answer insist, that the said *Richard* was not seised in fee: but that in 19 *Jac.* the premises were demised to *Okeley* for 60 years, and the day after that demise the said premises were demised to *Okeley* for 500 years, to commence from the expiration or other determination of the said 60 years. These indentures were made between Sir *R. Farmer* Sir *R. Brooke* and *Francis Poxenden* of the one part, and *Okeley* of the other part. In the last indenture *Poxenden* covenants with *Okeley* the lessee, that *Farmer* and *Brooke* should convey the freehold to such person or persons

as *Okeley* should appoint. By another indenture, 4 *Car. 1.* made between the administrator of *Okeley* and *Richard Staniford* the elder, of the one part, and *Henry Sutton* and *Richard Staniford* the younger, (therein described as heir apparent of *Richard Staniford* the elder,) and *Alice* his wife of the other part, reciting the said two former indentures, and that the terms were purchased with the proper monies of *Richard Staniford* the elder; the premises were thereby assigned to *Sutton* upon trusts (which had been then long since determined), and then in trust for *Richard Staniford* the younger for the remainder of said terms. *Edward Staniford* afterwards assigns those terms in trust for himself and wife in tail. The defendant *Barnard Cooke* obtained administration to *Robert Cooke*, the grandfather, and to *Anne*, the grandmother, and thereupon claims the term as part of the personal estate, subject to distribution. His Lordship decreed, that plaintiff should enjoy and be quieted in the possession of said premises, and that the trustee, in whom the legal estate of the term of 500 years was vested, should assign the residue thereof to plaintiff, or such persons as he should appoint. *Reg. Lib. A. 1740. fol. 89.* Here we may observe, that by the second indenture 19 *Jac.* *Farmer* and *Brooke* became trustees as to the freehold and inheritance of the premises for *Okeley*, whilst the legal estate for the terms was vested in him: and when *Okeley* declared the purchase-money

COOKE v.
COOKE:

presumption in favour of such a possession, though there may be some circumstances to shew that it was not the intention that the inheritance should be conveyed.

Where a person is owner of a term, and there is a covenant for the trustees to convey the inheritance, he is to be considered as the *cestui que trust* of the inheritance, because he might have called upon the trustee in this court to have assigned the legal estate.

When there is a covenant to convey the legal estate, this court will consider it as actually conveyed, and the term attendant only upon the inheritance.

Whether the legal estate is in the *cestui que trust* or in the trustees, it will make no difference, for where there is a covenant that it shall be conveyed, this court will consider it as actually conveyed, and will look upon it as a term only attendant upon the inheritance, and so connected together in the *cestui que trust*, that it can never be severed in favour of an heir or executor at least; there are some cases where it has been done in behalf of creditors (1).

It was decreed, that the plaintiff do hold and enjoy the premises, and be quieted in the possession, and that the defendant do not disturb him in such possession, or any person claiming by, from, or under him.

money belonged to *Richard Staniford*, then *Farmer* and *Brooke* became trustees for him. The plaintiff *Robert Cooke* as heir at law to *Anne*, who married *Robert* the grandfather, was therefore entitled to the equitable estate both of the inheritance and the term of years; but still

the term was directed to attend the inheritance.

(1) See *Willoughby v. Willoughby*, 1 Durn. and East 706. *Goodright v. Sales*, 2 Willf. 331. *Villiers v. Villiers*, post. 72.

Case 64.

Willats versus *Cay*, at the *Rolls*, Nov. 23, 1740 (1):

A wife may as well dispose of personal estate, over which she has an absolute controul, as of real, by joining in a fine with the husband; and on her consent in court, her whole fortune of 1300*l.* was directed to be paid to him, though he appeared to be an insolvent person.

THE sum of 1300*l.* was charged in trust, as a provision for a daughter, she marries without the consent of her retentions; it was insisted upon, by the counsel for the trustee, that the husband, who appeared to be an insolvent person, should find some method of securing the wife's money as a provision for her, but as he has neither real or personal estate of his own,

(1) 800*l.* was charged upon a real estate for the benefit of plaintiff's wife. The lands so charged afterwards vested in plaintiff's and defendant's wives; whereby the moiety belonging to defendant's wife became charged with 400*l.* and interest. Upon a bill brought to have a partition of the estate, and to have the 400*l.* and interest raised out of the said moiety belonging to the defendant's wife; his Honor decreed a partition, and that one moiety should be con-

veyed to the plaintiff's wife in fee, &c. and directed the 400*l.* and interest to be raised by sale or mortgage of the defendant's wife's moiety: "and the said plaintiff, *Mary Willats*, being present in court, and examined, and consenting and desiring that the said sum of 400*l.* and interest may be paid to the plaintiff *Thomas*, her husband, his Honor decreed the same to be paid to him accordingly." *Reg. Lib. B.* 1740. fol. 57.

he

he was incapable of doing it, and therefore it was proposed, that it should be referred to a Master, to consider of a scheme for securing some provision for the wife, as had been done in cases of this nature. WILLATS V. CAT.

The wife appearing in court, and being examined, desired that the whole 1300*l.* might be paid to the husband, without expecting any provision for herself, upon which, his Honor refused to refer it to a Master, which he said was never done unless circumstances of fraud appeared, or compulsion on the part of the husband, and that a wife may as well dispose of personal estate, over which she has an absolute controul, as of real estate by joining in a fine with her husband (1).

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(1) So *Milner v. Colmer*, 2 P. W. 642. *Levy v. Atbol*, post. 448. *Oldham v. Hughes*, post. 454. *Hearle v. Greenbank*, post. 3 vol. 709. *Parsons v. Dunne*, 2 Ves. 60. *Ex parte Higham*, 2 Vex. 579. *Ann. 2 Ves. 671*. *Minet v. Hyde*, 2 Bro. Cha. Rep. 663. *Dimmock v. Atkinson*, 3 Bro. Cha. Rep. 195. *Ellis v. Atkinson*, *ibid.* 565. *Hood v. Burlton*, 4 Bro. Cha. Rep. 121. In the case of *Newman v. Cartony*, Reg. Lib. B. 1770. fol. 275. a legacy had been given to the wife for her separate use during her life, with remainder to such persons and for such uses as she should appoint by will, and in default of appointment, to her executors; it was ordered, upon her consent, that the legacy should be paid to her husband. But that case has since been over-ruled by the subsequent one of *Socket & Ux' v. Wray*, and another, the 17th January 1794, at the Rolls. The bill in this case prayed, that the defendants might be compelled by the decree of the court to sell out and transfer 1234*l.* 2*s.* 1*d.* Bank 3 per cent. consols. standing in their joint names, in trust for the plaintiff Catherine Socket, and might pay the money arising from the sale thereof to the plaintiff Henry Socket. Upon the marriage of Henry Socket with Catherine his wife, a settlement was made bearing date the 24th of February 1791, between the plaintiffs of the one part, and the defendants of the other part: reciting (*inter alia*) that the said defendant Wray had placed out, and invested 1000*l.* in the joint names of himself and the defendant Morgan, in the purchase of 1234*l.* 2*s.* 1*d.* 3 per cent. consols. and that the said stock was then standing in their joint names: it was by the said settlement declared, that the

said defendants should stand possessed of and interested in the said stock, and the interest, dividends, and annual proceeds thereof, upon trust during the natural life of the plaintiff Catherine, when and as the same should become due, to receive and pay over the interest, dividends, and annual proceeds of the said sum of 1234*l.* 2*s.* 1*d.* and every part thereof into the proper hands of the plaintiff Catherine Socket, to and for her sole, absolute, peculiar and separate use and benefit, or to such person or persons as she by any note or notes, instrument or instruments, writing or writings, to be by her signing (notwithstanding her present coverture) should direct or appoint; and after the decease of the said Catherine Socket, upon further trust to transfer and pay over the said sum of 1234*l.* 2*s.* 1*d.* and every part thereof unto such person or persons, at such time and times, in such parts, shares, and proportions, in such sort, manner, and form, and subject to such powers, provisos, conditions, restrictions, and limitations as the said Catherine, whether sole or covert, and notwithstanding her present coverture, should at any time or times, by her will in writing, or by any writing purporting to be a will, give, direct, and appoint, and in default of appointment, and as to so much and such parts as should not be so appointed, upon trust to transfer, assign, and pay over the same unto the executors or administrators of the plaintiff Catherine, to and for their own use and benefit, and to and for no other use and benefit: and the settlement further provided, that it might be lawful for the defendants, by the express consent and direction of the plaintiff Catherine, testified in writing under

under her hand and seal, notwithstanding her coverture, but not otherwise, to sell and dispose of the said stock, or any part thereof, and with the like consent and direction of the plaintiff *Catherine*, testified in writing under her hand, to place and lay out the monies arising from such sale or sales in the public stocks or funds, or upon government or real securities at interest, and the same should continue in the names of the defendants, and should be subject to and upon such trusts and agreements, as well with respect to the interest, dividends, and annual proceeds, as to the capital stock, as were therein declared touching the said sum of 1234*l.* 2*s.* 1*d.* 3 *per cent.* *consols.*

The plaintiffs, being in want of money, applied to the trustees to sell the stock, and pay the money to them, which the trustees refused, as thinking they had not authority by the settlement to pay the wife more than the *interest*.

The plaintiff *Catherine* by the bill stated her desire to have the stock sold, and the money paid to her husband, and was ready to give her consent in court to have it so applied.

The Master of the Rolls took time to consider, and this day gave judgment to the following effect. The question is, Whether it is competent to the wife to waive the benefit of appointing this fund by *will* (if that is any benefit), and give it away in her life-time. The cases cited were *Pybus v. Smith*, *Ellis v. Atkinson*, and *Newman v. Cartony*. The last case is exactly in point with the present; but after considering the matter, I own that I cannot give my assent to that case. It was brought before the court by consent of all parties; therefore it was perhaps not very much considered. The cases of *Pybus v. Smith* and *Ellis v. Atkinson* differ from this, because they have the words "*deed or will*."

From the case of *Hulme v. Te Bro.* 15. I extract this principle, married woman in equity is capable being made in respect of her *præfeme sole*, but not as to her *person*.

In 3 *Bro.* 347. Lord *Thurlow* th that if upon settling property to separate use of the wife, the parties desirous to restrain her from parting it, they might insert a clause to effect.

Now the meaning of the presentment appears to me to be, the wife should have the interest with liberty to dispose of the property by an instrument, that should be *revocable* to the time of her death. leaving out the word "*deed*" is as to shew that she should appoint *only*, as if there had been an *and* clause. This is very beneficial to because she may survive the husband and then she would be entitled to of the fund in her life-time. I refer to the case of *Norton v. Turville*, *W.* 144.

It is said for the plaintiffs, if this power had been given to a *female* or to a *man*, could they not have disposed of it in their life-time? If they might, and if they had entered a bond, it would be assets in the hands of their representatives. But there contract that will bind a married woman but in respect to her separate property. In this case if she had entered a bond, I think it would not affect the hands of her executors or administrators. A married woman has no but what the will or settlement gives. This settlement gives her a power to dispose of the property by *will* *only* if she survived her husband, it might be a very different case. As I am of opinion that the wife can only dispose of this stock by *will*, this bill must be dismissed.

Standford versus Marshall, November 2, 1740.

Case 65.

A Father, by deed, creates a trust of a real estate for the benefit of his daughters, the rents and profits to be paid them whether sole or covert for their separate use, either to their own, or the hands of any person that they shall appoint. The daughters join with their husbands in bonds, for money lent to their husbands; the trustee refuses to pay, the creditor brings a bill to compel him to pay the rents and profits of the trust estate.

By deed a father directs rents and profits of a real estate to be paid to his daughters, whether sole or covert for their separate use, they join in bonds for money lent to their husbands;

the trustee ordered by the Court to pay the rents and profits accordingly.

Master of the Rolls. The daughters had an absolute power over the rents and profits, and could certainly assign them by mortgage or otherwise, and the court will never encourage the locking up of property, which would be the case if the daughters could not create any lien they thought proper upon their interest in the estate, and therefore ordered the trustees to pay the rents and profits of the trust estate to the creditor (1).

*Almon v. Bar
by Simons 32*

(1) *Reg. Lib. B.* 1740, fol. 131. The authority of this case is established by *2 Ves.* 669. *Hulme v. Tenant*, 1 Bro. *Cha. Rep.* 16. *Pybus v. Smith*, 3 Bro. *Cha. Rep.* 340. *Vide Clerk v. Miller*, *Grigby v. Cox*, 1 *Ves.* 517. *Peacock v. post.* 379. *Mont*, 2 *Ves.* 190. *Purlet v. Delaval*,

Brasbridge and others versus Woodroffe, at the Rolls, November 14, 1740. Case 66.

THOUGH the executors in this case have legacies, one of 200 l. the other of 100 l. yet if it appears in proof by parolevidence, that, both before and after the execution of the will, the testatrix always declared that the next of kin, who were plaintiffs in this cause, should have nothing, and that she would not leave them any thing by her will, the executors shall, notwithstanding, have the residue.

Where a residue is undisposed, and a testatrix has always declared the next of kin shall have nothing, executors, though they are legatees, shall have the residue notwithstanding.

Where it is undisposed of, it was objected by the plaintiffs' counsel, that evidence of the testatrix's intention of excluding the next of kin, is not sufficient to give the residue to the executors; the evidence ought to be positive that she had it in contemplation to give it to the executors at the time of making of the will.

BRASERIDGE v. WOODROFFE.
The court, with respect to the residue, will depart from their general rules in favour of the next of kin, where the testator's intention is proved to be against them.

Master of the Rolls: I am fully satisfied, If I should in this case give the residue to the next of kin, I should give it contrary to the intention of the testator.

The court will certainly favour the next of kin, where they can do it consistently with the rules of equity and justice, but this does not tie me down from inquiring into the intention of the testatrix; for wherever there is evidence (1), that will satisfy the mind of the court as to the intention, they will depart from their general rules, though they will not do it upon slight proofs.

The giving 200 l. to one executor, and only 100 l. to the other, is a presumption upon the face of the will that it was not intended to exclude them from the residue, but only to shew a preference to one of them (2). *Vide Bachelor versus Searle*, 2 Vern. 736.*

Though the will was drawn by Doctor Hales, a clergyman, who is not supposed to be conversant of the law, yet that will make no alteration in favour of the executors, but it must depend on the proofs.

There is no medium between next of kin, and executors, for if the former appears to be excluded, the executor must have it of course.

In answer to the objection of the plaintiff's counsel, it is enough if the court is satisfied as to that single fact, that the next of kin were not to have it, for there is no medium between the next of kin and executors; for if it appears that the intention was to exclude the next of kin, the executor must have it of course.

The bill dismissed, but without costs, because when the next of kin are disappointed of the residue, it is some excuse, said the court, for their litigating the executor's right to it.

(1) *Gainsborough v. Gainsborough*, 2 Vern. 252. *Littlebury v. Buckley*, 2 Vern. 677. *Bachelor v. Searle*, 2 Vern. 736. *Rutland v. Rutland*, 2 P. W. 210. *Rachfield v. Careless*, *ibid.* 158. note 1. *Ulrich v. Litchfield*, *post.* 373. *Lake v. Lake*, 1 Will. 313. *Walker v. Walker*, *post.* 99.

(2) So *Buffar v. Bradford*, *post.* 222. *Blinkborn v. Feast*, 2 Ves. 27. 30. *Bowker v. Hunter*, 1 Bro. Cha. Rep. 328. *Frewin v. Relfe*, 2 Bro. Cha. Rep. 220. *Oliver v. Frewin*, 1 Bro. Cha. Rep. 590.

* One by will gives his executor an express legacy, and makes no disposition of the surplus. The court will admit of parol evidence to shew the intention of the testator, and if proved that the testator intended the surplus to the executor, he shall have it, notwithstanding his express legacy. *Bachelor & Ux. versus Searle*, 2 Vern. 736 (3).

(3) 1 Eq. Ab. 246. pl. 12. S. C.

Ex parte Gumbleton, November 8, 1740.

Case 67.

A Motion was made on behalf of a woman who was a quaker and lives 250 miles from hence, for a writ of *supplicavit*: the doubts in this case arose from the words of the statute of 7 & 8 W. 3. whether a quaker may be admitted to give evidence upon her affirmation so as to exhibit articles of the peace against her husband; and if it is not in nature of a criminal prosecution, and not grantable but upon oath of the person.

A quaker cannot be admitted to exhibit articles of the peace against her husband, upon her affirmation, as it is in nature of a criminal prosecution.

LORD CHANCELLOR took a few days to search for cases of this kind, and upon looking into them said, I find a great variety, and that affirmations have been generally refused: I have been likewise inquiring of the judges for precedents in point; there is one reported in 3 Salk. 248. *Hilton v. Biron*, 11 W. 3. B. R. but this is a book of no authority, the note however I have of it I believe is authentick; this was in the case of articles of the peace; and the Court held that, it being a criminal matter, they could not grant an attachment, unless the person would consent to be sworn; for if the party complained of is not in court, there is an attachment goes for a breach of the peace upon the oath of the complainant. The other case was in the 11th year of the late king, *ex parte Green*, on the motion of the present Chief Justice of the Common Pleas, upon the affirmation of the person who moved for the *supplicavit*, and the Court granted the motion: but as there are authorities both ways, I will not take upon me to determine it, but shall refer it to the judges, and the expence to come out of the person's pocket who moves for the *supplicavit*.

In the case of articles of the peace, where the party complained of is not in court, an attachment for a breach of the peace goes on the oath of the complainant.

But as I have instances in my hand, where persons who called themselves quakers, upon their affirmations being refused, have brought their consciences to digest an oath, perhaps Mrs. *Gumbleton*, as she goes in danger of her life, may dispense with the strict rules of her sect, and may be persuaded to swear likewise; if not, I will consult with the judges upon it.

Smith versus Marshall, the same Day.

Case 68.

WHERE infants are parties to a cause, and the mother secretes them so as they cannot be served, a service of *be subpoena* upon the mother is sufficient, as she is the natural guardian of the children.

Where a mother secretes her children who are infants, service of a *subpoena* on her is sufficient.

Cafe 69. *Smallman verſus Lord Archibald Hamilton*, at the *Rolls*, November 6, 1760.

Lord L. gives D.P. an annuity for life, ſhe dies in 1718, and in 1740, a bill is brought by her repreſentative for the arrears from 1708 to the death of P. the Court, from the length of time, preſumed it to be paid, and diſmiſſed the bill with coſts.

Though it is a rule, that the ſtatute of Limitations will not run as to a legacy, yet it will not hold as to an annuity.

LORD Lucas, by his will, left to one *Dorothy Potter*, an annuity of 25*l. per ann.* for her life; ſhe dies in 1718, and the plaintiff, as the repreſentative of the annuitant, brings a bill for the arrears of the annuity, ever ſince the year 1708 to the death of Mrs. *Potter*.

Maſter of the Rolls: Though there is no proof of the defendant's ſide that it had been paid, yet the diſtance of time is the ſtrongeſt preſumption that it has been long ſince ſatiſfied (1); the ſtatute of Limitations ought to be the rule to direct the Court in this as well as in other caſes, though the doctrine has prevailed, that the ſtatute will not run as to a legacy (2), yet it will not hold as to an annuity, and therefore the bill muſt be diſmiſſed with coſts.

(1) See *Standiſh v. Radley*, *poſt.* 178.

(2) *Parker v. Aſh*, 1 *Fern.* 256. See alſo *Jones v. Turberville*, 4 *Bro. Cha. Rep.* 115.

man Cafe 70.

Willis verſus Willis, November 7, 1740.

Kirkley
Cypell
3. All declarations of truſt under the ſtatute muſt be in writing.

THE ſtatute of Frauds and Perjuries, ſaid the Court, requires that all declarations of truſts ſhould be in writing; otherwiſe abſolutely void, except ſuch as ariſe by operation of conſtruction of law (1).

He who pays the purchaſe-money has a reſulting truſt, but then he muſt clearly prove the payment.

Now truſts of this nature are when the legal intereſt is in another, but the purchaſe money has been paid by a third perſon; this is a reſulting truſt for him who paid the money, but then he muſt clearly prove the payment (2).

Parol evidence admitted to ſhew a truſt from the mean circumſtances of the pretended owner of the real eſtate.

There is another way of taking a caſe out of the ſtatute, and that is by admitting parol evidence within the rules laid down in this court, to ſhew the truſt, from the mean circumſtances in the pretended owner of the real eſtate or inheritance, which makes it impoſſible for him to be the purchaſer.

(1) *Kirk v. Webb*, *Prec. Cha.* 88. (2) *Poſt. Loyd v. Spillet*, 150.

Cafe 71.

Villiers verſus Villiers, November 15, 1740.

S. C. Barn. Cha. Rep. 307.

A counterpart may be read if an original deed is loſt, and if no counterpart a copy, and if no copy, parol evidence of the manner of its being loſt;

deſtroyed by fire, or loſt by any unforeſeen accident, they are of themſelves ſufficient excuſes.

THE rule of evidence, ſaid Lord Chancellor, is that the be evidence the circumſtances of the caſe will allow muſt be given (1).

(1) *Lewellin v. Mackworth*, *ante* 40. See *Healey v. Philips*, *ante* 48.

If an original deed is lost the counterpart may be read, and if there is no counterpart forth-coming, then a copy may be admitted, and even if there should be no copy, there may be parol evidence of the deed, and the manner of its being lost, unless it happens to be destroyed by fire, or lost by robbery, or any unforeseen or unavoidable accident, which are sufficient excuses of themselves: but then the copy must not be inconsistent, and variant from the title, which is set up by the party, who claims under the original deed, as it is in this case; for the limitations here under the copy are different from what they are set out to be in the pleadings.

If land be given to a man without the word *heirs*, and a trust be declared of that estate, and it can be satisfied by no other way but by the *cestuy que trust's* taking an inheritance, it has been construed that a fee passes to him even without the word *heirs* (1).

A term attendant upon the inheritance is considered as a part of it, and cannot be disannexed in this court (2); there is hardly any family where the estate is considerable but there are such terms; and it would be absurd to say that when a will is not executed according to the statute of Frauds and Perjuries, that such a term shall be severed from the inheritance, and pass, notwithstanding the inheritance to which it was annexed would not pass under such a will (3).

It has been insisted, that in this case a term of 60 years is merged by being created to the same person to whom the fee was devised, and who had likewise the reversionary interest in another term for 99 years: but Mr. *Villiers's* counsel have on their side contended that there is no merger, because there was a trust of this term that kept it separate, and consequently was not merged.

But then the plaintiffs contend that as the testator had granted a lease for 60 years to the same person, to whom he had devised the fee, paying a rent to the testator for life of 200*l.* per ann. that it was a revocation of the fee: but I am of opinion that the lease is merged in the inheritance, and is not like the case of *Cooke v. Bullocke*, *Cro. Jac.* 49. because there the term was not to commence till after his death, and then there was a joining of two estates that were inconsistent together, which was the reason of the Judges determining it to be a revocation (4).

I find no authority whatever at law (and it depends upon the construction of the law) that a demise of a lease for years to the same person to whom the fee is devised, and which commences in the life of deviser, is a revocation of the fee (5).

(1) *Gibson v. Montfort*, 1 *Ves.* 491. *Amb.* 93. *S. C.* *Oates v. Markham*, 3 *Burr.* 1684. *Bagshaw v. Spencer*, *post.* 578.

(2) *Charlton v. Low*, 3 *P. W.* 330. See ante 67. *Cooke v. Cooke*.

(3) *Whitchurch v. Whitchurch*, 2 *P. W.* 236. *Goodright v. Sales*, 2 *Wils.* 329.

Scot v. Fenboulet, 1 *Bro. Cha. Rep.* 69. *Harg. Co. Litt.* 290. b. n. 1.

(4) See *Stone v. Evans*, *post.* 87.

(5) But in the above case of *Cooke v. Bullocke*, it was agreed by the Court, that such lease would be no revocation. 1 *Eq. Ab.* 410. pl. 8. *S. C.* See vide *Haknes v. Bayley*, *Pres. Cha.* 514.

VILLIERS v. VILLIERS.
Trustall's Sec.
J. Simons.
E. of Egmont
of Pulman
32 B. 622.
Doc d Gilbert
Refs
J. Jones: 40: 10.
A fee will pass without the word *heirs*, where a trust of land can be satisfied no other way. *L. Jones*
A term attendant upon the inheritance is a part of it, and shall not be severed from it, nor can it pass without it. *Lat. 40.*

VILLIERS v. VILLIERS. Upon the appeal in *Peacock* and *Spooner* to the House of Lords, the judges in their opinions were equally divided, but the decree below was affirmed notwithstanding.

The case of *Peacock* versus *Spooner* will not govern the present, that case received different determinations; it was heard first by Lord Chancellor *Jeffereys*, in P. T. 1688, afterwards heard in M. T. 1690, before the Lords Commissioners, and appeal to the House of Lords, the judges' opinions were taken as appears by the minutes. Lord Chief Baron *Atkyns* was of opinion that it belonged to the executor of the wife; *Nesbitt* differed from him, *Gregory* agreed with *Atkyns*, *Letchmere* differed again, and so alternately through all the judges, but the decree of the Lords Commissioners was affirmed notwithstanding * (1).

Then came the case of *Webb v. Webb*, 2 Vern. 668, where my Lord *Harcourt* reversed the *Master of the Rolls*'s decree. There the limitations were to the husband for life, to *Thomas Webb*, *Ann* his wife for life, remainder to the heirs of the bodies of *Thomas* and *Anne* during the residue of the term; if the wife dies leaving issue, the whole term, notwithstanding, vests in the husband, and he may assign it. There has been a distinction taken of late years in the case of *Peacock v. Spooner*, that there it was *sub potestate viri*, as the estate moved from the husband; but I can find no grounds for this opinion from the minutes of the House of Lords, and therefore must be thrown out of the case.

This court will carry into strict settlement, an estate limited to a husband for life, to the wife for life, remainder to the issue of their two bodies.

A limitation in marriage articles to the husband for life, the wife for life, remainder to the issue of their two bodies, will not intitle a husband, by virtue of such a remainder, to dispose of the estate as he shall think proper, but will be carried into strict settlement in this court (2).

Where children are infants at the time of their bringing a bill, the allegations of it cannot be read against them after they come of age.

* Term assigned in trust for baron and feme for their lives, remainder in trust to the heirs of the body of the feme by the baron; baron and feme die. Lord Chance *Jeffereys*, who first heard the cause, held the whole interest of the term vested in the wife, and must go to her executors. 2 Vern 43. But said the Lords Commissioners upon a re-hearing, the term shall go to the heir of the body of the feme by the baron and not to her executor or administrator, the words, *heirs of the body*, being a *descriptio personæ*. *Peacock v. Spooner*, 2 Vern. 195.

(1) See 2 Vesf. 237. 660. (2) See *Hart v. Middleburgh*, post. 3 vol. 3.

Crop versus *Norton*, and *Norton* versus *Norton*, November 8, Case 72.
1740.

OLD *Richard Norton* of *Southwick* in *Hampshire*, the last life in a lease under the bishop of *Winchester*, agrees with colonel *Norton* to surrender the old lease upon the bishop's promising to grant a new lease for three lives, for old *Norton's* life, for colonel *Norton's* life, and the son of colonel *Norton*, an infant of tender years; at the time there was a private agreement between old *Norton* and colonel *Norton*, that in consideration of his surrendering the old lease, the new one should be in trust for the infant, son of colonel *Norton*.

S. C. Barn. Cha. Rep. 179.
R. N. the last life in a bishop's lease, agrees with *C. N.* to surrender this lease on a promise of the bishop to grant a new one for three lives, viz. for *R. N.'s* life, *C. N.'s* life, and

the son of *C. N.* and in consideration of *R. N.'s* surrendering the old lease, it was agreed the new one should be in trust for the infant son of *C. N.* The whole purchase-money was paid by *C. N.* to the bishop, but the legal estate was granted in the new lease to *R. N.* and his heirs during his own life and the lives of *C. N.* and his son. *C. N.* after the death of *R. N.* took upon him to dispose of it. *R. N.* by a deed-poll dated the day after the lease, declares his intention to be, that *C. N.* and his son should after his decease hold to them and their heirs during the remainder of the term. Lord *Hardwicke* held *R. N.* had a valuable share in the consideration of the new lease, having given up his interest in the old, and that having a right to declare the trust, *C. N.* had his life only in the lease.

Colonel *Norton* paid the whole money to the amount of 1500*l.* to the bishop of *Winchester* for renewal, but the legal estate in the new lease was notwithstanding granted to old *Norton* and his heirs during his own life and the lives of colonel *Norton* and his son: colonel *Norton* after the death of old *Norton*, imagining he had the whole property in the lease, took upon him to dispose of it.

*See the Case
1740 Barn. Ch.*

The original bill was brought by Mr. *Crop*, the purchaser from colonel *Norton* for performance of articles, and the cross-bill by the son of colonel *Norton*, to have a deed-poll that had been executed by old *Norton*, which declares the trust of the new lease, and was found in his custody at his death, produced by the defendant, colonel *Norton*, and to be kept in court for the benefit of the plaintiff in the cross cause.

Colonel *Norton* was neither party nor privy to the deed-poll.

Old Mr. *Norton's* declaration of trust of the new lease, under the deed-poll, was subsequent in time to the lease itself only one day.

LORD CHANCELLOR,

Two questions arise upon the original bill.

The first, Whether Mr. *Crop* is intitled to have the articles carried into execution, as against the defendant colonel *Norton*, for there is no pretence as against the defendant *Richard Norton* the son, he being no party to the articles, and has by his cross-bill insisted on his right, and set up an equitable claim to this lease under the deed-poll. The general question in the original cause, as I said before, depends upon another question, whether colonel *Norton* has a title to the estate; for if he has not, the Court will not do an impossible thing, but leave the plaintiff, Mr. *Crop*, to law upon the articles.

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Admitting that colonel *Norton* has not the legal estate, the next question will be if he has the equitable, for this court will in that case equally decree performance of articles.

CROFT v.
NORTON.

This depends upon two considerations.

1st. The circumstances of the transaction between old *Richa Norton* and colonel *Norton* relating to the renewal of the lease.
2dly. Upon the deed-poll.

Consider it first upon the circumstances of the case divested of the deed.

Old *Norton* had the sole interest in this estate, and tho' he had only one life, yet he had the right of renewal; it is true he could not compel the bishop to renew; but this as to colonel *Norton* who came in by permission of old *Norton*, must be considered a right and interest, and the person who comes in under the new lease has always been looked upon in this court as deriving from the person who had the old lease.

The losing letters which when written were not material, is no reflection upon a party.

The letters which have been read to shew the agreement between old *Norton* and colonel *Norton* are of no consequence one way or another; and tho' it appears in the cause there were other letters, yet these being lost is no reflection upon colonel *Norton*, for persons do not keep all letters which at the time their being written were not perhaps material.

I am of opinion upon the whole, that there is no result in trust whatsoever for colonel *Norton*.

His counsel for him have argued, that where the purchase money is paid by one person and the legal estate is in another that this by operation of law is a resulting trust for the person who paid the money, and the doctrine is very right where the whole purchase money is paid by one person (1).

But here the whole value of the purchase is not paid by colonel *Norton*, for the 1500*l.* is only part of the consideration, the lease was not entirely fallen in, and therefore a material circumstance was the consent of old *Norton* to surrender the old lease.

[76]

The next consideration is the deed-poll, executed the 14 of *August* 1722, the very day after the lease. It recites the life of old *Norton* to be the only remaining life in the old lease "know ye therefore, that I having given my consent to surrender, &c. declare my intention is, and my desire was always that the said colonel *Norton* and his son should immediately after my decease hold to them and their heirs this estate ——— during the remainder of the term."

Now this is a plain declaration of the trust, he having the legal estate, and a right to do it, and the only person from whom the trust was to move.

But then it has been said it is very hard old *Norton* should have a power of giving away so beneficial an interest from colonel *Norton* who paid the whole fine.

The Court considers writings executed near together as one transaction.

But when writings are executed so near together, it is very natural to think that they are all in pursuance of one transaction and agreement between the parties.

It is said it is very unnatural that *Thomas Norton* should have the whole 1500*l.* and yet have only a reversionary interest

(1) *Loyd v. Spillet*, post. 150.

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NORTON.

his own life, and if the last life had been a stranger, it might indeed have been a hardship; but as colonel *Norton's* son is the last life, it is so far from being a hardship, that it was a benefit, for old *Norton* parted with a valuable interest, that colonel *Norton* might have an opportunity of purchasing an advantage for his son.

I must determine upon an express declaration of trust by old *Norton*, who had the legal interest, and a valuable share in the consideration of the new lease at the time it was purchased, and consequently the only person who had a right to declare the trust, and there can be no pretence for an implied trust by operation of law.

I do therefore declare that colonel *Norton* had his life only in the lease.

Now as to *Richard Norton* the son, the question is, Whether the deed-poll shall be delivered up by the purchaser, to be kept for the sake of the son, who, if this opinion be right, has an interest in the estate.

At the time of the mortgage, the mortgagee, Mr. *Crop*, had no notice of the deed-poll, but at the time of the articles of his purchase he had.

Therefore the deed-poll must be brought into court for the benefit of all parties; but I will not decree it to be delivered to any one of the parties.

Northey versus *Northey*, November 10, 1740.

[77]

Case 73.

A Bill was brought by Mrs. *Northey*, the widow of the late Mr. *Northey*, against the executor of the husband, to have her *paraphernalia*, part of which was presented by the husband, and the other part given by her own relations; but the husband, in his life-time, having taken them into his own possession, gave some of them to different persons, as specific legacies by his will, and the rest he has directed to be sold by his executor.

LORD CHANCELLOR,

The widow might have brought her action of trover for these specific things, as the executor has not assented to the legacies; for at law a legacy does not vest in the legatee till the executor's assent (1); but then legatees may come against an executor in this court, and he will be decreed to deliver the specific legacies, according to the will, for this court considers him as no more than a bare trustee for legatees.

At law a legacy does not vest in the legatee, till the executor's assent, but in equity, he will be decreed to deliver the specific legacies, being considered here as a bare trustee.

It has been objected, that the specific legatees are infants; and are not before the court; and I am of opinion, the specific legatees ought to have been brought before the court; and, unless the plaintiff will waive the part that is devised to them, the cause must stand over to make proper parties.

(1) Sir *Thomas Alway* v. *Miller*, *post*. *Bank of England* v. *Moffat*, 3 Bro. Cba 598. *Flinders* v. *Clarke*, *post*. 3 vol. 510. Rep. 262.

Case 74. On December the 6th, 1740, this Cause came on again to be heard (1).

A husband, by will, disposes of jewels, of which the wife was possessed in his life-time, bought partly with her own, and partly with his money, to his brother, whom he made executor; she brings a bill for those only which are given to the brother: Lord Hardwicke held clearly, that the wife was intitled to them as *paraphernalia*.

THE plaintiff, the wife of the late Mr. Northey, in his life-time, was possessed of several jewels, part of them bought with her own money, and part with her husband's, and proved in the cause, that she wore them but six weeks before his death, and subsequent to any will or codicil of the late Mr. Northey who has given part of the jewels, by will, to his brother, and made him executor: the bill was brought by the widow, as to those jewels only which are given to the brother, as executor, and now waives any right she might claim to the rest of the jewels, *paraphernalia*, which are left by the will to her children.

The will had given the plaintiff the jewels for her life, provided she makes an inventory of them, and enters into a security to double the value, for refunding, in case of a second marriage. But by a codicil in August, 1738, the testator revokes this part of his will, and gives the residue (exclusive of the part to the children) to his brother the executor.

[78]

Mr. Chute, of counsel for the defendant, the executor insisted, that it is merely a legal question, and ought to be determined at law by an action of trover, as the plaintiff is under no imbecility which can entitle her to come into this court; and, with regard to the general question, urged these things.

First, that the testator has absolutely disposed of the jewels.

Secondly, And the most material is, the plaintiff had not that kind of property in these things as *paraphernalia*, upon which she can ground such a claim.

Before the case of *Tipping v. Tipping*, 1 Wms. 729. in Lord Macclesfield's time, he said, it was very far from being a point clearly settled.

In the case of Lord Hastings and Sir Archibald Douglas, *Cra. Car.* 343. and 1 Roll. 911, 912. the court were equally divided.

It appears likewise in the cause, that the wife was not with her husband at the time of his death; and that the jewels were kept under lock and key, and that she was permitted only to wear them sometimes, at his pleasure.

And there ought to be such a special property in the wife at constant possession and custody, in the life-time of the husband, to support her claim as *paraphernalia*.

That the defendant, the executor, found them locked up in the husband's bureau, at the time of his death.

That after making the will, there was evidence, indeed, that she wore the jewels; but this was only a bare permission of the husband, and not absolutely in her power.

(1) *Reg. Lib. B.* 1740. fol. 28,

LORD CHANCELLOR,

NORTHEY v.
NORTHEY.

There are some cases, both in law and equity, so plain, that they will not admit of any dispute.

The late cases have gone so far in the point of *paraphernalia*, that they have considered a wife in the nature of a creditor, and as having a lien upon real estate (1). A wife, with respect to *paraphernalia*, has been considered as a creditor, and having a lien upon real estate.

Though the jewels here are worth 3000 l. at least, yet the value makes no alteration in this court. [* 79] The value of the jewels makes no alteration.

There are several cases where there have been debts standing out against the husband, and yet the wife has been admitted as a creditor to the value of the *paraphernalia*, even upon trust estates created for payment of debts. A wife has been admitted a creditor to the value of her *paraphernalia*, upon a trust estate for payment of debts.

The being in the custody of the husband will make no alteration, for the possession of the husband is the possession of the wife, and so *vice versa*, as she wore them for the ornament of her person whenever she was dressed. The husband's possession of jewels makes no alteration, where the wife has worn them as ornaments whenever she was dressed.

The testator having taken upon him to dispose of the *paraphernalia*, which he had no power to do, I direct the estate of the husband to pay the costs, and decree for the wife according to the prayer of the bill (2).

(1) See *Snelfon v. Corbet*, *post*. 3 vol. 359. (2) See *Probert v. Morgan*, *ante* 1 vol. 441, 442.

Bicknel versus Page, November 10, 1740.

Case 75.

A Man, in his will, expressly devises his real estate to trustees, for the payment of all such debts as he shall owe, legacies and funeral expences; then follow some pecuniary legacies, and some of specific parts of the personal estate; and then he gives all the residue of his personal estate to his executors. Where a real estate is expressly devised for payment of debts, the personal estate is exempted, but if the real is not sufficient, the personal must be applied.

LORD CHANCELLOR,

This case certainly comes under the rule laid down in *Adams v. Merrick*, at the *Rolls*, *Equity Cases Abridged*, 271. That where real estate is expressly devised for payment of debts, the personal estate is exempted: but if the real estate be not sufficient, the personal estate must be applied; and if there is any residue, the executors are entitled to it (1).

(1) There was a mortgage upon the estate so devised, which was also decreed to be paid off out of the monies arising by the sale thereof. *Reg. Lib. A. 1740. fol. 264. See Galton v. Hancock, post. 439. note. Walker v. Jackson, post. 625.*

Case 76.

Fleetwood versus Templeman, the same Day.

*11
v.
12.*
S. C. Barn. Cha.
Rep. 187.

A Man and his wife, in the year 1692, made a mortgage the wife's estate of 40 *l. per ann.* for the sum of 789 *l.* A covenant in a mortgage deed by husband and wife in 1692, to levy a fine in the *Easter* term following, but not levied till *Trinity* term in 1695; in consideration of 10 *l.* more, they in a conveyance of the equity of redemption, and covenant the fine heretofore levied, should be to the uses of this deed in a conveyance of the equity of redemption, and covenant the fine heretofore levied should be to the uses of this deed. Lord *Hardwicke* held the covenant in to be good and binding on the husband and wife, and that the former deed might be laid out of the as the covenant under it was not strictly pursued.

[*80]

LORD CHANCELLOR said, he was inclined to think, as covenant to levy the fine under the first deed was confined to particular term, and was not levied till the next term after, the husband and wife might, by the deed in 1695, covenant the fine heretofore levied should be to the use of the latter deed and that the former deed in 1692 might be laid out of the as the covenant under it for levying the fine in *Easter* term not strictly pursued (1).

(1) *Countess of Rutland v. Earl of Rut-* *Shelley's case, 1 Co. 99. b. Fox-*
land, Cro. Jac. 25. 5 Co. 25. b. S. C. Morley, 2 Salk. 677. Curth. 410. S.

Case 77.

Sandys versus Watson. At the Rolls the same Day.

Where the estates of two testators have been blended so as create confusion, the executor of an executor shall be excused costs, tho' it appeared he had assets enough to pay the plaintiff's debt.

A BILL was brought against an executor of an executor for a debt of the first testator; the defendant denied a but at the same time set out specially in his answer, that estates of the two testators were so blended together, that could not positively say, whether there are assets or not.

On a reference to a Master, it came out, that there assets enough to pay the plaintiff's debt, and some small more.

The Master of the Rolls of opinion, that the executor, in case, must pay the debt in the first place to the plaintiff, or the assets, and if there are any left, after such payment, he retain to pay himself the costs of this suit (1): If there had been the favourable circumstance of the confusion arising the two estates, the executor must have paid the costs of his own pocket, and the residue of the assets applied to debts.

(1) *Humbrey v. Moore, post. 108.*

Philips versus Paget, November 11, 1740.

Case 78.

MRS. *Paget*, by her will, gives a legacy of 100*l.* to each of the three children of Mr. *Philips*, and makes the defendant her executor, leaving him the bulk of her estate, provided he pays the three legacies of 100*l.* within a year after her death, pursuant to her will. The defendant, within the time, pays to the childrens' own hands their legacies; the eldest of them was sixteen years old at the time, the next fourteen, and the youngest nine only; and in his answer denies * he knows this money ever came to the father's hands; but the children have now brought their bill against the defendant, to be paid their several legacies, suggesting that their father has imbezzled the money, paid by the defendant during their infancy, and is insolvent; and that this was a fraudulent payment to the father, and therefore it must be paid over again.

An executor, pursuant to a will, pays into the hands of the three children of *Philips* their legacies of 100*l.* each; the eldest sixteen, the second fourteen, and the youngest nine years of age at the time; the father imbezzled the money; bill brought for a re-payment. Lord *Hardwicke* held at first, that as the executor

made this payment to save a forfeiture of what he himself took under the will, he ought not to pay it over again; but the next day his Lordship thinking it a doubtful point, recommended it to the defendant to give the plaintiffs something, who, agreeing to pay in 50*l.* to be divided among the three children, they were ordered to release their legacies (1).

LORD CHANCELLOR asked the counsel for the defendant, if they knew any instance where an executor paying so large a sum as 100*l.* into the hands of minors, has been allowed such payments? Indeed, in cases where the legacies have been very small, the payment has been allowed by the court.

[*81]

But, in this case, notwithstanding the sum is above 100*l.* yet as the payment, by the executor to the children themselves is so fully proved, and not at all controverted by the plaintiffs, and their losing the benefit of it is owing to the negligence and insolvency of the father, I will not strain the rules of this court to make an executor pay it over again; especially as he made this payment to save a forfeiture, it being an express condition of his own taking under the will, that he should discharge their legacies within a year after Mrs. *Paget*'s death.

(1) See *Dagley v. Tolferry*, 1 P. W. Rep. 96. 186. *Davies v. Austen*, 3 Bro. 285. *Cesper v. Thornton*, 3 Bro. Cha. Cha. Rep. 178.

Philips versus Paget, November 12, 1740.

THE next day, LORD CHANCELLOR said, That upon looking into the cases, he found this a very doubtful point, and unless the defendant will agree to give the plaintiffs something, he would not determine it, without taking time to consider of it: the defendant, upon this recommendation of the court, agreed to pay in 50*l.* to be divided between the three plaintiffs; and each side were to abide by their costs; and it was made part of the decree, that the 50*l.* was paid by consent of all parties; and his Lordship directed each of the plaintiffs, upon receiving their respective shares, to release the legacies under the will.

The

PHILIPS v.
PAGEY.

Though Lord Cowper in the case of *Dagley* versus *Tolferry*, confirmed the *Master of the Rolls's* decree, yet, by the report of the case, had a remorse of judgment at the time.

The case of *Dagley* ver. *Tolferry*, 1 *Peer Will.* 285. *Gillb. Eq. Rep.* 103. he said, must have some other circumstances, for the rule is laid down too strictly, that (in all cases where executors pay infants' legacies to fathers) in order to deter executors from such payments, they shall be paid over over again: Lord Cowper confirmed the *Master of the Rolls's* decree; but he seemed, even by this report of the case, to have had a remorse of judgment at the time, for, on looking into the Register's office, it appears, his Lordship ordered the deposit to be divided between the parties.

[82]

Case 79.

A devise for life of goods, must sign an inventory, to be deposited with the Master for the benefit of all parties.

Bill versus *Kinaston*, November 12, 1740.

LORD CHANCELLOR said, that where goods are given to a person for life only, the old rule of the court was, that such person should give security that they should not be imbezilled (1), but the method now is, for an inventory to be signed by the devisee for life, and to be deposited with the Master, for the benefit of all parties (2).

(1) *Bracken* v. *Bentley*, 1 *Cha. Rep.* 110.

(2) *Reg. Lib. A.* 1740. fol. 283. See also *Lecke* v. *Bennett*, ante 1 vol. 471. 1 *Bro. Cha. Rep.* 279.

Case 80.

Bowden versus *Beauchamp*, November 12, 1740.

A co-administrator, who was a plaintiff in a bill in 1723, brings in 1739 a bill, partly of revivor, and partly supplemental, to the same purpose pretty near with the original: Lord Hardwicke allowed the plea of a former dismissal, for otherwise, he said, it would be keeping up a right *in nubibus* and *in custodia legis*, and parties would never know when to be at rest.

A Bill was brought by two persons as co-administrators for an account of personal estate in 1723; one of the plaintiffs dies in 1725, the surviving plaintiff moves by his counsel to dismiss the bill without costs, which was consented to by the counsel on behalf of the defendants: the representative of the co-administrator, in 1739, brings a bill, partly a bill of revivor, and partly supplemental, and pretty much to the same purpose with the original bill; the defendants to this bill plead the former dismissal.

LORD CHANCELLOR,

It must be allowed in this case; for though it is suggested by the counsel for the new bill, that the former was brought by the co-administrator in two rights; first, by virtue of the administration; and secondly, as next of kin, for a distributive share of the intestate's estate;

Yet, upon the death of one of them, the administration survived to the other, and there was no necessity that there should be a representative of the deceased administrator before the court when the bill was dismissed.

Besides it would be a very great inconvenience, where there are several plaintiffs, and one of them dies, if after such a length of time, bills of revivor should be allowed; this is keeping up a right *in nubibus*, and in *custodia legis*, and parties would never know when to be at rest: and, as to the other right of distribution

tion which is set up under the old bill, it will not avail the plaintiff in the new, because he should have made the representatives of the estate (who claim a right of distribution as next of kin) parties to the suit. I do therefore allow the plea, and leave the plaintiff to bring an original bill if he thinks proper (1).

BOWDEN v.
BLAUCHAMP.

[83]

(1) *Reg. Lib. A.* 1740. fol. 16.

Prunella v. *Vernia* R. G. 2. R. 7 cl. 562

The East-India Company versus *Vincent*, November 15, 1740 (1). Case 81.

LORD CHANCELLOR said, there are several instances, where a man has suffered another to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conscious of his right, and the person building had no notice of the other's right, in which the court would oblige the owner of the ground to permit the person building to enjoy it quietly, and without disturbance.

Where a man suffers another to build on his ground, without setting up a right till afterwards, the Court will oblige the owner to permit to enjoy it quietly.

the person building to enjoy it quietly.

But these cases have never been extended so far as where parties have treated upon an agreement for building, and the owner has not come to an absolute agreement; there, if persons will build notwithstanding, they must take the consequence, and this is not such an acquiescence on the part of the owner, as will prevent him from insisting on his right.

Blakemore
Hamorgan
Canal Comp.
M. & Heen. 13
Parrots - Pale
M. & Heen 6's

If I should give an opinion that lengthning of windows, or making more lights in the old wall than there were formerly, would vary the right of persons, it might create innumerable disputes in populous cities, especially in *London*, and therefore I do not give an absolute opinion, but I should rather think it does not vary the right.

Lengthning of *Pow.*
windows, or *Hum.*
making more *b. H.*
lights in the old
wall than for-
merly, does not
vary the right of *300*
persons.

Where an agent of the *East-India* company is in treaty with an owner of ground, for a liberty for the company to build, and the owner, at the time of the treaty, in consideration of his consent, insists upon terms, to which the agent makes no answer or objection, but immediately afterwards the company think proper to build, the silence of the agent shall be construed an acquiescence under the proposal of the owner of the ground, and shall bind the company his principals, as being in the consideration of this court the agreement of the agent.

*circulus & line
1. 4. 6. 8. 10.*

I am of opinion, that notwithstanding the company's dismissing Mr. Vincent from their service as a packer, contrary to their agreement between him and the agent of the company, yet he is not justified in building a wall, merely to block up the lights, but he might have brought his bill in this court, to establish the agreement between him and the company's agent as a compensation for consenting the company should build upon his ground.

Shaffington
at 1000
3. 4 c coll.

Pendergass

Tinton.
 1. 4 & Coll. 1
 2. 2

98
Hastie & Co
Chanc. Hall

Upon the whole, I must decree the wall erected by the defendant to be pulled down; but then I must direct in his favour,

Handwritten: *Handwritten*
b. Handwritten: 27

(1) The statement of this case is in *Reg. Lib. A. 1740. fol. 112.* The facts there seem perfectly to coincide with and to warrant Lord *Hardwicke's* observations.

that

EAST-INDIA
COMPANY v.
VINCENT.

that the company do employ him double to any other packer during his term in the estate, provided he does it at the same rates that people of the same trade would do.

Case 82. *Lee and others versus Carter and others, November 17, 1740.*

A Voluntary society was established of a number of persons, to provide for such of the club as should become necessitous, and likewise for the relief of the widows of those of the club who died insolvent.

Four persons, who were trustees for one particular year, lent 60*l.* of the stock of the society to *Carter* the defendant, (who is an alehouse-man, and at whose house they kept their meetings) upon bond (1). *Carter* gave some particular members leave to set off their alehouse scores against the interest they had in the money due upon the bond from *Carter*.

LORD CHANCELLOR,

Where there is a general trust of money for a society, a particular member cannot set off a private debt against a share he may be intitled to on a contingency.

I know no instance, where there is a general trust of money for a society of persons, that any particular members can set off their private debts against the shares they may be intitled to upon contingencies, which possibly may never happen to be the case of these persons.

This is so unwarrantable a behaviour, and so unjust a defence, that *Carter* and those persons who have set off their alehouse scores must pay the whole costs of the suit, and likewise the costs at law (2).

(1) This was done with the consent of the majority of the society.

(2) *Reg. Lib. B. 1740. fol. 112.*

Case 83. *Lloyd versus Carter, November 17, 1740.*

A. gave a woman who cohabited with him, a bond for 2000*l.* and interest quarterly during her life, and after her death to her children, but from the date of the bond to the day of his death, which was four years and a half, constantly maintained her. Lord *Hardwicke* held the maintenance must clearly be taken in lieu of interest.

A. To whom the plaintiff is administrator, lived and cohabited with the defendant for several years, and had a long intercourse with her, on a promise of marriage, and during this cohabitation, he gave a bond to a person in trust for the payment of 2000*l.* and interest quarterly, for the benefit of the defendant, who is a widow, during her life, and after her death to her children, but from the time of the bond to the day of his death, which was four years and a half, *A.* constantly maintained her: the defendant has sued the plaintiff at law upon the bond, who comes into this court, and by his bill offers to pay the principal and interest likewise since the death of the intestate, but insists he ought not to pay the interest accrued due in the life-time of the intestate, because his maintenance of the widow and her family, after giving the bond to the day of his death, must be taken to be in lieu of interest.

LORD

LORD CHANCELLOR,

LLOYD v.
CARTER.

This is a very plain case for the plaintiff, for he certainly is not obliged to pay any interest accrued due in the life-time of the intestate, because maintenance must clearly be taken to have been in lieu of interest (1).

(1) This cause was directed to stand over, with liberty for the plaintiff to amend her bill. *Reg. Lió. B.* 1740. fol. 80.

Fitzgerald versus Sucomb, November 20, 1740.

Case 84.

IT was now moved to discharge the election the plaintiff had made of proceeding at law by a former order on coming in of the defendant's answer. The plaintiff had brought his action at law for the debt, and likewise a bill in this court for a discovery of assets, and thereby prayed that the defendant might come to an account with the plaintiff and pay what should be due to him.

It is an established rule, that if you elect to proceed at law on coming in of the answer, your suit here must be dismissed, but on dropping that part of the bill which prayed

relief, the plaintiff was allowed to proceed at law.

The old rule of this court said LORD CHANCELLOR was, that you might proceed at law for the debt, and likewise in equity for a discovery of assets; but it is an established rule now that if you make your election to proceed at law upon coming in of the answer to your bill, your suit here must be dismissed, because it prays relief as well as a discovery; but upon the plaintiff's agreeing to drop that part of his bill which prayed relief, *Lord Chancellor* discharged the order for the election, and allowed the plaintiff to proceed at law (1).

(1) See *anqn.* 3 *P. W.* 90. n. b.

Tendril versus Smith, November 24, 1740.

Case 85. *Wh*

LORD CHANCELLOR. Where copyhold lands are surrendered to the use of a will; by a devise of lands generally, the copyhold will pass notwithstanding there are freeholds to answer such devise (1).

A copyhold surrendered to the use of a will, will pass by a general devise of lands notwithstanding there are freeholds.

Where a father and a child of full age come to an agreement to alter the limitations under a settlement, there is no ground of equity for a child to set aside such agreement, under pretence of being drawn into it by the power and authority of a

An agreement between a child and a father to alter the limitations under a settlement, will

not be set aside, on pretence of being drawn in by the father's power and authority.

Light v. Night.

15 Beant. 242 (1) *Smith v. Baker, ante* 1 vol. 386.

father,

TENDRIL V. SMITH. father, and to restore the antient limitations again (1). In a case in Lord *Cropper's* time, where a father prevailed upon a son, who was tenant in tail under a settlement, to take an estate for life only with remainder to his first and every other son, his Lordship would not set it aside upon the suggestion of the father's having an undue influence over him, &c.

(1) In the marriage settlement there was an estate limited to the father for life, with a remainder (in default of issue male) to daughters in tail. It was provided in the settlement, that if the wife should die in the husband's life-time without issue male, leaving a daughter, and the husband should marry one or more wife or wives, who should have one or more son or sons, *then and in such case* the husband and such son and sons were empowered to annul the limitations in the settlement upon paying the sum of 2000*l.* to such daughter at 18 or marriage. The estate so settled was in mortgage for a term of years. The wife dies without issue male, leaving a daughter, who thereupon became entitled to an estate-tail in remainder, with a reversion in fee to her father, subject to the aforesaid proviso. Afterwards in November 1729, the father mortgages the whole in fee; and the first mortgage being paid off, the second mortgagee takes an assignment of the prior mortgage term. In December 1729, (before the father's second marriage, which happened in 1732), the father and daughter (in consideration of her being paid said 2000*l.*) agree to convey the estate to trustees to be sold in order to pay off the mortgage, and 2000*l.* to the daughter: the surplus to the father. The conveyance was prepared, but executed by the father *only*. The daughter however was privy and consenting to the business, and in her will took notice that she was entitled to said 2000*l.* No fine

was levied, and the daughter dies. The father devises all his lands *generally* to his second wife, who now brings her bill to have the deed of trust set aside, and insists that the 2000*l.* ought not to be raised for two principal reasons:—*First*, because the circumstances which were required by the proviso to avoid the limitations, were not legally observed, viz.—the father at the time of the conveyance not being married to a second wife, who had issue male:—*Secondly*, that as the father had no power to annul the uses of the settlement until such second marriage, so the daughter being entitled to an estate-tail, she could not convey that estate without a *fine*. Therefore as the daughter had died without issue, and without barring the entail, and as the deed of trust was executed upon a *supposition* that the father by an equitable construction of the proviso, had a power to alter the uses upon payment of the 2000*l.* the deed of trust ought to be set aside, and the said 2000*l.* ought not to be raised out of the estates so devised to the wife. But it was decreed, that the 2000*l.* should be raised by sale of the freehold and copyhold lands, and the surplus money be paid to the wife. *Reg. Lib. B.* 1740. fol. 167. With respect to parental influence, see *Cory v. Cory*, 1 Ves. 19. *Kinchant v. Kinchant*, 1 Bro. Cha. Rep. 369, 374. See also *Heron v. Heron*, post. 101. *Young v. Peachy*, post. 254. *Hawkes v. Wyatt*, 3 Bro. Cha. Rep. 156.

Case 86. *Stone versus Evans*, at the Rolls, before Mr. Justice Wright, December 14, 1740.
Willems. Remptel.
Siccardus. 524.

THE will of *Afgil Evans*.

Inprimis, I give unto my nephew *Rollinson Evans* all the income or dividend on my *South-sea* annuities, now standing in my name in the books of that office (1).

(1) With remainder to his sister *Eleanor's* children.

The

The rest and residue of my estate real and personal, and all my effects whatsoever and wheresoever, I give and bequeath into my executrix, or to her heirs, executors, administrators or assigns; and I do hereby appoint my sister *Eleanor Evans* my sole executrix.

STONE v. EVANS.
A testator gives the residue of his estate to his executrix, or to her heirs, executors, administrators

v. assigns; she died in his life-time; Mr. Justice Wright held, it was given her as executrix, and she dying before him, he is dead intestate as to the residue.

The codicil.

Also I give unto my niece *Margaret Stone*, after the decease of my sister *Eleanor Evans*, 20*l.* a year, to be paid out of my *South-sea* annuities, now standing in my name in the *South-sea* book during her natural life, and no longer; and after her decease, I give the abovesaid 20*l.* a year unto my sister *Eleanor Evans's* children, share and share alike.

Agill Evans by his will devises to his nephew *Rollinson Evans* all his dividends on his *South-sea* annuities, and afterwards by a codicil gives his

niece *Margaret Stone* 20*l.* a year for her life, to be paid out of his *South-sea* annuities; held not to be a revocation *in toto*, but that both devises may stand consistently together.

The executrix died in the life-time of the testator.

Rollinson Evans is dead.

The husband of *Margaret Stone* had one shilling given him under the will.

The defendant is administrator, to the executrix, and claims in that right.

The 1st question was, Whether Mr. *Agill Evans* is dead intestate as to the residue?

The 2d question was, Whether charging 20*l.* a-year annuity upon the old *South-sea* annuities during the life of *Margaret Stone* by the codicil, is a revocation of the devise *in toto* to his nephew *Rollinson Evans* under the will?

[87]

Mr. Justice Wright: If it had been given as residue to her as executrix only, and she had died in the life-time of the testator, there is no doubt but it would have been a lapsed legacy: but then upon the subsequent words, the question will be, whether they are a limitation only, or descriptive of some other person.

To be sure from the cases cited, and several other cases to that purpose, there is no doubt but the word *or* is construed as a copulative, as well as a disjunctive, where it is to support the intention of a person; but the design of the testator in this case plainly appears from the last words, that he gave her the residue as executrix, and all the subsequent words may be rejected as surplus (1); and she being dead in the testator's life-time, he certainly is dead intestate as to the residue, and it must go amongst the next of kin.

As to the second point, whether the devise of the 20*l.* *per annum* is a total revocation of the devise to *Rollinson Evans*: it is not inconsistent like the case of real estate, for there a term for years given to the same person to commence at the testa-

(1) *Maybank v. Brooks*, 1 Bro. Cba. Rep. 34. *Hutchinson v. Hammond*, 3 Bro. Cba. Rep. 128.

STONE V.
EVANS.

If a man leaves twenty several papers behind him, executed at different times, they shall all be taken as one will, and so construed as that all may answer the testator's intention.

tor's decease is not consistent with the fee devised to him before (1); but here such construction must be made as that both legacies may take place.

The manner of disposing of a real and personal estate under a will, and under a codicil, is very different; for if a man leaves twenty several papers behind him executed at different times, in respect to personal estate, they shall all be taken as one will, and the Court will endeavour to reconcile them together so that they may all answer as near as possible the intention of the testator (2).

(1) See *Villiers v. Villiers*, ante 72.

(2) *Reg. Lib. B.* 1740. fol. 69.

Case 87.

The Attorney General versus Pearce, December 6, 1740.

S. C. Barn. C.
R. 288.

Each particular
object may be private,

A Question was made in this case relating to a charity arising out of the wills of Mrs. *Squire* and Mrs. *Northcote*.

but it is the extensiveness which will constitute it a public charity.

Sh v. Mordby
9 ear. 177.
Loosembe
in Tringham
30 Dec. 1741

Several charities of a public nature were given under the will of Mrs. *Squire*; the executrix, Mrs. *Northcote*, by her own will gives 100*l.* to each of the public charities which Mrs. *Squire* had mentioned in her will.

The distinction attempted for the defendant was that Mrs. *Northcote* meant by the word *public* in her will to distinguish it from private charities.

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LORD CHANCELLOR,

I am rather of opinion that the word *public* was meant only by way of description of the nature of them, and not by way of distinguishing one charity from another; for it would be almost impossible to say which are public and which are private in their nature.

The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a public one.

A devise to the poor of a parish is a public charity.

A devise to the poor of a parish is a public charity; the same as to a disposition of a sum among poor housekeepers.

Where testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to chuse out the objects, though such person is private; and each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them they may very properly be called public charities. A sum to be disposed of by *A. B.* and his executors, at their discretion, among poor housekeepers is of this kind (1).

(1) *Reg. Lib. A.* 1740. fol. 216.

Goldsmith & Goldsmith
2 Hall 190
Ingram versus Ingram, December 8, 1740.

Case 88.

MR. Ingram by his marriage articles and settlement had a power of disposing of a reversionary interest in copyhold land, subject to an estate for life in his wife, in such shares and proportions as he should think fit among the issue of the marriage, and for want of such appointment by the husband to his right heirs; and this power was directed to be executed by deed in his life-time, or by will at his death. He by his will, reciting the power under the articles and settlement, delegates it to his wife, that she may, in such shares and proportions as she shall think proper, dispose of it between his son and daughter; and for want of such appointment, in equal shares between his two children.

S. C. cited
1 Vef. 259.
A power under a settlement for a husband to dispose of a reversionary interest in an estate in such proportions as he should think fit, among the issue of the marriage; he by will, delegates it to his wife, to dispose of in such shares as she pleases between his son and daughter.

as she pleases between his son and daughter.

LORD CHANCELLOR,

This must be considered as a power of attorney which could be executed only by the husband, to whom it is solely confined, and is not in it's nature transmissible or delegatory to a third person; therefore the intermediate appointment to the wife under Mr. Ingram's will is absolutely void, and the latter part where he gives it in equal shares between the two children, is a good appointment within the marriage articles and settlement.

Lord Hardwicke held it to be like a power of attorney, and not transmissible to a third person, but could be executed by the husband only (1).

(1) *Alexander v. Alexander*, 2 Vef. 640. *Attorney v. Berryman*, 2 Vef. 643. *Whitfield*, 1 Vent. 338, 339. cited. Secus where the power is limited to a person and his assigns. *How v.*

Hodgeson and others versus Bussey, November 18, 1740.

[89 *Thurs*

EDWARD Bussey possessed of a term of 59 years, by a settlement made after marriage, dated January the 21st, 1731, conveyed it to trustees in trust to permit his wife Grace Bussey

Case 89.
S. C. cited
2 Vef. 236. 652.
660.
S. C. Barn. Cha. Rep. 195.

Edward Bussey, termor for 59 years, by settlement conveys it to trustees, in trust, to permit his wife Grace Bussey to receive the rents during the term, if she so long live, and after her decease to permit him to enjoy the rents during his life, and after his decease, in trust for the heirs of the body of Grace, by Edward Bussey, and for default of such issue, remainder to Henrietta Hodgeson for her life, and after her decease, in trust for her two sons, William and Edward.

Edward Bussey died, having never had any issue, and Grace, his wife, survived him. Lord Hardwicke held, that the whole term was not vested in Grace Bussey, and that the words HEIRS OF THE BODY, were not words of limitation, but purchase, and directed the lease to be decreed in trust for the benefit of all parties (1).

(1) The general rule with respect to term of years, (and the same rule applies to other personal estates; see *Beauclerk v. Damer*, post. 308.) seems to be, that whenever an estate in a term of years is limited to a person, which limitation if applied to freehold property would create

an estate-tail, and a remainder is thereon given after a general failure of issue or heirs of the body, the whole vests in the first taker, and the remainder over is void. *Webb v. Webb*, 1 P. W. 132. *Barford v. Lee*, 2 Freem. 210. *Ferreyer v. Robertson*, Bunb. 301. *Saltern v. Saltern*, post.

HODGKINSON v. *Busshey* to receive the rents and profits for her sole and use during the term, if she should so long live; and, a
 Bussy. use during the term, if she should so long live; and, a
 in the v. *Martin* decease, to permit *Edward Busshey* to enjoy the profits
 (Simon: 270. during the remainder of the term, if he should so long
 and, after his decease, in trust for the heirs of the
 Grace, by *Edward Busshey* begotten, their executors,
 strators and assigns; and for default of such issue, rema
 trust for *Henrietta Hodgkinson* during the residue of the
 she so long live, and, after her decease, in trust for
 sons, *William and Edward*.

After making this settlement, *Edward Busshey* died, never had any issue, and *Grace* his wife survived him.

post. 376. *Exel v. Wallace*, 2 *Ves.* 120. *Garth v. Baldwin*, 2 *Ves.* 646. *Pelham v. Gregory*, 5 *Bro. Cha. P. C.* 435. *Doe v. Lyde*, 1 *Durn. and East*, 593. 596. But if there be any clause or restriction, whereby it plainly appears, that the words heirs of the body or issue were intended as words of purchase (as in the present case of *Hodgkinson v. Busshey*. *Clare v. Clare*, *Ca. temp. Talb.* 21. *Withers v. Algood*, 1 *Ves.* 150. *Sands v. Dixwell*, 2 *Ves.* 652. *Doe v. Lyde*, 1 *Durn. and East*, 593. 596. *Knight v. Ellis*, 2 *Bro. Cha. Rep.* 570.) or if the dying without issue is restrained to the death of the tenant for life, whereby the remainder over can take effect as an executory devise; (vide *Read v. Snell*, post. 642. 646. *Lampley v. Blower*, post. 3 vol. 396. 398. *Theobridge v. Kilburne*, 2 *Ves.* 233. 236. 238. *Attorney General v. Bayley*, 2 *Bro. Cha. Rep.* 553.) in either case the words heirs of the body or issue will operate as words of purchase. Indeed the Court of Chancery seems willing to collect any circumstances which may restrain the generality of the words dying without issue to a dying without issue living at the death of the tenant for life. *Nicholls v. Skinner*, *Prec. Cha.* 528. *Target v. Gaunt*, 1 *P. W.* 432. *Hughes v. Sayer*, 1 *P. W.* 534. *Pinbury v. Elkin*, 1 *P. W.* 563. *Forth v. Chapman*, 1 *P. W.* 663. *Atkinson v. Hutchinson* 3 *P. W.* 258. *Sheffield v. Lord Orrey*, post. 3 vol. 282. *Goddittle v. Pegden*, 2 *Durn. and East*, 720. Some cases even go so far as to say, that the expression dying without issue will of itself imply a dying without issue living at the time of the person's decease. *Nicholls v. Hooper*, 1 *P. W.* 199. *Target v. Gaunt*, 1 *P. W.* 432. *Pinbury v. Elkin*, 1 *P.*

W. 565. *Pleydel v. Pleydel*, 1 748. But the modern cases do a construction on those words *et mini*. *Beaucherk v. Dormer*, 1 314. *Saltern v. Saltern*, post. 370 *ford v. Bulkley*, 2 *Ves.* 181. *Attneral v. Hird*, 1 *Bro. Cha. R* *Bigge v. Bensley*, 1 *Bro. Cha. R* *Glover v. Strathoff*, 2 *Bro. Cha.*

It is observable, that if a term is limited to *A.* for life, remainder to the subsequent words will not *en* *express* estate for life, but upon t of *A.* the whole will vest in l *Warman v. Seaman*, *Finch, C.* 279. *Clare v. Clare*, *Ca. temp.* 9 post. 91. But where a term is li *A.* for life, and if he die witho remainder over. Lord *Thurlow*, the case of the *Attorney General ley*, 2 *Bro. Cha. Rep.* 558. and *Knight v. Ellis*, *ibid.* 578. was of that, as the subsequent words plied to a *freehold*, would enl estate for life into an *estate-tail* *cation*, so in respect to *real and* *chattels*, it would vest the absol perty in *A.* The reason of this tion between these two cases is plained by Lord *Thurlow* in th above noticed. And the reason remainder in the first instance *purchase*, when the same limit applied to a *freehold*, would c *estate-tail*, (2 *Lev.* 58.) is given *Talbot* in the case of *Clare v. Clau* cited. Note, if in the above the remainder had been limited heirs of the body of *A.* the whol have vested in *A.* See *Webb*. *Theobridge v. Kilburne*. *Garth v* *win*, and other cases cited *supra*.

The bill is brought by the plaintiffs for the discovery of the settlement, and to have their interest in the term declared, and the deeds secured for their benefit, after the decease of the wife, the defendant *Grace Bussey*, who insists, by her answer, that she is intitled to the whole term.

HODGKINSON v.
BUSSEY.

The question in this cause is, Whether she is so intitled, or for life only?

December the 5th, 1740, LORD CHANCELLOR gave judgment.

The general question, he said, was, Whether the plaintiffs are intitled to have a decree for the securing of the deeds, and that depends upon the interest they have in the trust of this term.

It appears in the cause, that there was no issue of the wife, Mrs. *Grace Bussey*, the defendant.

The great point which has been relied on for the defendant is, that the limitations to *Henrietta Hodgson* and her son are too remote to take place: and that the deed is so penned, that the whole trust of the term is vested in the defendant *Grace Bussey*.

[90

Secondly, That if there had been such heirs of the body of *Grace Bussey*, they would have taken the whole term; and her having no issue will not vary the case, but that it is an estate-tail in the defendant, as heirs of the body are words of limitation, and not of purchase, and consequently the limitations to *Henrietta Hodgson* and her son are too remote.

I am of opinion, that the whole term is not vested in *Grace Bussey*, and that the words, *heirs of the body*, are not words of limitation, but of purchase.

The general run of cases makes this plain, that notwithstanding they sound like words of limitation, yet, upon circumstances, and the intention of the parties, they may be construed words of purchase, and descriptive of the person who is to take. *Archer's case*, 1 Co.

The case of *Lisle v. Grey* goes further, reported in *Sir Thomas Jones*, 114. 2 Lev. 223. and *Raym.* 278.

It was held in that case of *Lisle and Grey*, that the words *heirs of the body*, coming after the limitations to the first, second, third and fourth sons, were words of purchase.

The case of *Lisle and Gray* is differently reported; but by the record searched

by Mr. Justice Tracy it appeared, the judgment in the King's Bench was affirmed in the Exchequer-chamber.

It is differently reported in the several books I have mentioned; but Mr. Justice Tracy said, in the case of *Legat and Sewell*, 1 P. W. 90. that he had searched the record in *Lisle and Grey*, and that the judgment in the Exchequer-Chamber affirmed the judgment in the court of King's Bench.

Words of limitation are not properly used on terms for years, and therefore it is not to be wondered at, that such construction should be found in so many cases, where words of limitation are made use of in terms for years.

Words of limitation are improperly used on terms for years.

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BUSHBY.

Peacock v. Spooner, 2 Vern. 43. & 195. heard first before Lord Chancellor Jefferys, and re-heard before the Lords Commissioners, who reversed the former decree, and held the words *heirs of the body*, to be words of purchase; an appeal to the House of Lords, and the opinion of all the Judges taken, and the decree of the Lords Commissioners affirmed (1).

Another case before Lord Somers, of *Daforne v. Goodman* 2 Vern. 362. and after this case follows *Web v. Web*, before Lord Harcourt, reported in 2 Vern. 668. and more particularly in P. W. 1 vol. 132. than in Mr. Vernon's Reports, but not full as it ought to be neither.

[91]

I am at liberty to determine this case, as if *Web v. Web* were out of the way, as I am of opinion, that the words *heirs of the body* here must be held equally to be words of purchase, as they were in *Peacock v. Spooner*, *Dunn* and *Merrick*, heard before Sir Joseph Jekyll at the Rolls, the 27th of October, the 41 year of Geo. 2. the limitations there were under a will, in the following words: "Item, All other my leasehold estates I devise to Richard Merrick, my executor, to the following uses, to John Merrick for life, to Catherine Merrick for life, and to the heirs of their bodies, and to their executors, administrators, and assigns;" but in that cause an issue was directed to try the power of the testator under a particular deed to devise, and no determination by the late Master of the Rolls as to the point, Whether the words *heirs of the body* were words of purchase or limitation.

The intention of the parties appearing on a deed, always governs the court in constructions.

The court will make a favourable exposition of words in marriage-settlements to support the intention of the parties, the same as to voluntary ones.

All the cases that I have mentioned on trusts for terms for years, are all grounded upon the manifest and apparent intention of the parties: an objection has been taken, that such constructions have been upon settlements or wills only, where the intention of the party always prevails.

But the case of *Lisle and Gray*, 2 Jones 114. 2 Lev. 22 is a full answer to this objection, for there it was not a marriage-settlement, but a settling of lands by John Lisle, who was seised in fee, in his name and blood; and it is not the consideration of it's being a conveyance on marriage, or on any other account, but the intention of the parties appearing on the deed, that always governs the court in constructions.

In the cases of marriage-settlements, the Court will make favourable exposition of words to support the intention of the parties, and even in voluntary settlements, if the words lean more strongly to the one construction than to the other, it must likewise prevail.

The words, if Grace Bushby shall so long live, are in affirmative, implying a negative at the same time, that if she did not live so long, the remainder of the term should go over.

The present case is more strong to this purpose than any the cited cases; for I am of opinion, that it will be the same here upon the words, if she shall so long live, as if it had been

(1) As to the authority of this case, see 2 Ves. 237. 660.

express

expressly given her for life only; *vide* the case of *King v. Mel-ling*, 1 *Vent.* 214, 225. HODGKINSON v. BUSSEY.

It was allowed at the bar, even in case of a freehold, that if the words *for life* only had been inserted, it must have put it out of doubt, notwithstanding heirs of the body had followed; so here, *if she shall so long live*, is an affirmative, implying a negative at the same time, that if she did not live so long, the remainder of the term shall go over to the plaintiffs (1).

The reason the words, *heirs of the body*, vest an estate-tail in the first taker, either in the limitation of a freehold, or upon a term, is, that it includes issue *in infinitum*.

The second thing relied upon for the defendant, is the limitation over being too remote. *Vide Higgins versus Dowler*, 2 *Vern.* 600. *Clare and Clare, Cas. in Eq. in the time of Lord Talbot*, 21. *Sabbarton v. Sabbarton, Ditto* 55. and 245.

[92]

I am of opinion, that if the words *heirs of the body of Grace Buffey*, are words of purchase, there is no limitation in tail, and that it is the same as if the limitation had run to the 2d, 3d and 4th sons, or if no son, then to daughters; for the intention was, that it should vest in some particular person, and not go on in succession from heir of the body to heir of the body, and to executors, &c. of the heir of the body, but it must vest in the first taker; as if it had been to the first son, his executors, administrators and assigns, for and during the residue of the said term, and for want of such issue, remainder to the plaintiff's heirs (2).

Now the words for want of *such* issue, will be the same as if it had been said, for want of such son or such daughter; for the word *such* confines it to *such* issue as is meant by the words *heirs of the body*, and then it is not too remote a remainder, but brings it to the case of *Gore v. Gore*. *Vide* 2 *P. Wms.* 28.

is meant by the words *heirs of the body*.

I am apprehensive it may be objected, that this is like the case of *Higgins v. Derby*, 1 *Salk.* 156. but the present differs greatly, for there it was said to be an attempt to intail a chattel, and therefore construed to vest in the first son, to prevent the inconvenience of a perpetuity.

Here the words, *heirs of the body*, must mean heir of the body living at the time of the death of *Edward Buffey*, or born in some reasonable time after, and that differs it from all the cases that have been cited.

Heirs of the body here mean, the heir of the body living at the death of *Edward Buffey*, or born

in a reasonable time after, which differs it from all the cases.

Upon the whole, I declare the plaintiffs *Henrietta Hodgson* and her son intitled to the trust and benefit of the term of 59 years, being the reversionary term after the decease of the defendant *Grace Buffey*.

(1) See note 1. *supra*, 89. (2) The reasons here stated are also mentioned by Lord Hardwicke in 2 *Ves.* 236. 660.

HODGESON v.
BUSSEY.

The lease of the 7th of *July*, 1709, whereby the said term is created, I order to be deposited in court for the benefit of all parties; and direct the defendant to deliver to the plaintiff *Henrietta Hodgeson* a counterpart of the settlement in 1731 (1).

(1) *Reg. Lib. A.* 1740. fol. 306.

[93]

Blackwell versus Harper, December 8, 1740.

Case 90.

S. C. Barn. C.
R. 210.

The act of 8
Geo. 2. for the
encouragement
of the arts of
designing, en-
graving, &c.
is not merely
confined to
works of inven-
tion only, but
means the de-
signing or en-
graving any
thing that is already in nature (1).

A Question arose in this cause upon the act of parliament made in the 8th year of *Geo. 2. chap. 13.* intitled, An act for the encouragement of the arts of designing, engraving and etching historical and other prints, by vesting the properties thereof in the inventors and engravers for fourteen years, to be computed from the 24th of *June*, 1735 (2). The plaintiff *Mrs. Blackwell* has engraved no less than 300 medicinal plants, and has now brought her bill to establish her right to the sole property in them, and to restrain the defendants from copying and engraving them, upon the penalties within the act of parliament.

For the plaintiff For the plaintiff was cited, the case of *Baller*, administrator of *John Gay*, Esq. versus *Walker* and others; the printers and sellers of the second part of the *Beggars Opera*; a perpetual injunction was granted, and an account decreed: it was heard before Lord Chancellor *Talbot*.

Mr. Attorney General for the defendant insisted, first, that this is a monopoly, and an infringement upon the common law the plaintiff therefore must make out very clearly that she is exactly within the words of this act of parliament.

Secondly, That this does not come within the meaning of the act, which has the word *inventors*.

For engraving is not properly inventing, and therefore is no within the act, unless it had been something in the mind, and not already in nature, as all these plants certainly are.

Thirdly, That the name of the proprietor should have been engraved on each plate, and printed on every such print; so *Mrs. Blackwell* might both delineate and engrave them, and yet not be the proprietor of them. It ought to have been mentioned at the foot of each print, when it was published, the day of the first printing, and the name of the proprietor, that all mankind may know when it commences, and when it expires, and that people may be apprized to sell clear of the penalty in this act.

The only charge against the defendant is selling, which is not liable to the penalties of the act, unless the person selling knows them to be printed by one who is not the author and

(1) See the statutes 7 Geo. 3. c. 38.
17 Geo. 3. c. 57.

(2) Vide *Jesserys v. Baldwin*, Amb
164.

proprietor of them, and knows likewise who is the real author at the same time. The forty first plants produced in the cause are as common plants as exist, and are in every herbal extant; and it could never be the intention of the act, to include such as inventions, which have been published before, only in another form.

LORD CHANCELLOR,

The principal thing insisted on for the defendant, is the want of engraving *the time*, and *the name*, at the foot of each plate, as the fourteen years are to commence from the day of the first publication.

It was objected in the case of *Baller versus Walker*, that the book ought to have been registered in *Stationers'-Hall*, or otherwise it is not notice of property within the 8th of *Queen Anne*, c. 19. but this objection was over-ruled by the Court.

This is the first case under the act of the present king.

Two objections have been taken against the injunction, and to the account prayed by the bill.

First, Against the right of the plaintiff, as not being such prints as are within the meaning of the act.

Secondly, If they are, that Mrs. *Blackwell* has not complied with the terms of the act of parliament so as to vest the sole property in herself.

As to the first objection. It is extremely clear that they are prints within the meaning of the act of parliament. It has been said that the words of this statute must be confined strictly to invention, and not to engraving any thing copied from what is already in nature; but this certainly never could be the design of the act.

The words of the act are; "Every person who shall invent
"and design, engrave, etch, or work in *metzotinto*, or *chiaro*
" *oscuro*, or from his own works or invention, shall cause to
"be designed and engraved, etched, or worked in *metzotinto*,
"or *chiaro oscuro*, any historical or other print or prints, shall
"have the sole right and liberty of printing and re-printing the
"same, for the term of fourteen years to commence from the
"day of the first publishing thereof, which shall be truly en-
"graved with the name of the proprietor on each plate, and
"printed on every such print or prints."

But I do not think the act confines it merely to invention; as for instance, an allegorical or fabulous representation; nor to historical only, as, suppose the design of a battle, &c. but it means the designing or engraving any thing that is already in nature.

Therefore, I am of opinion, that if there should be a print published of any building, or house and gardens, or that great design of Mr. *Pine's* of the city of *London*, they will all come properly within this act of parliament; or else it would be narrowing it greatly, and making it of little use.

If it had not been for the clause thrown in for Mr. *Pine's* benefit, any body might have copied the prints of the hangings

in

A print published of any building, house, or garden, fall within this act of parliament.

BLACKWELL
v. HAMPER.

in the House of Lords, for what is tapestry but copies taken from drawings.

The defendant, to make out the case he aims at, must shew that these prints of medicinal plants are in any other book or herbal whatsoever, in the same manner and form as they are represented here, for they are represented in all their several gradations, the flower, the flower cup, the seed vessel, and the seed.

The second objection is, as to the directions of the act, that Mrs. Blackwell has not complied with the terms of it so as to vest the sole property in herself. *Elizabeth Blackwell sculpsit et delineavit* is sufficient, and are the very words of the act of parliament to shew the person to be the proprietor.

The more material objection is, as to the day of publication, for it is insisted here is no *terminus a quo*, from whence the term is to commence, nor the *terminus ad quem* when it shall expire.

The property in the prints vests absolutely in the engraver, though the day of publication is not mentioned.

I am of opinion that the words are only directory, and not descriptive of the day, and that they are only necessary to make the penalty incur, and that the property in the prints vests absolutely in the engraver, designer, &c. though the day of the publication is not annexed to the foot of it.

The property of books cannot vest without being first registered with the stationers' company.

Upon the act of 8 Ann, c. 19. the clause, of registering with the stationers' company, is relative to the penalty, and the property cannot vest without such entry; for the words are, "That nothing in this act shall be construed to subject any book seller, &c. to the forfeitures, &c. by reason of printing any book, &c. unless the title to the copy of such book hereafter published, shall, before such publication, be entered in the register book of the company of stationers."

Here the clause which vests the property is distinct.

The clause concerning the printing and re-printing, and publication, relates to the penalty, and is distinct; it is true, in the first act the clause is separate, but that will make no difference in my opinion.

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The next consideration is, what will be the consequence.

The plaintiff will be intitled to a perpetual injunction, but not to an account of profits, because it would be hard to make the defendant account as he was ignorant of the property.

In the case of *Baller v. Walker*, it was stated by the bill, and not denied by the answer, that the book was entered in Stationers'-hall, and costs were given for that reason.

There is a material objection in this case against giving costs that the defendant, though he knew the plants were published yet did not know the exact time, so that they might have been published before the act.

My construction, that the words requiring the day to be annexed at the foot of the act are directory, and not descriptive of the day, I do not say is so certain, but judges may think otherwise (1); however, as it is doubtful, I cannot give costs, nor decree any thing more besides a perpetual injunction.

(1) See *Sayer v. Dacey*, 3 Wils. 69.

Watkins by her next Friend versus *Ferdinando Watkins* her Husband, December 10, 1740. Case 91.

A Bill was brought against the husband to have a maintenance out of her fortune, upon a suggestion of very cruel usage without any provocation on her side.

A bill brought by a wife for maintenance, on suggestion of cruel usage by the

husband; and on the part of the defendant, as an excuse for his ill usage, depositions were offered to prove a criminal conversation; unless it is expressly charged by the answer, the Court will not suffer such depositions to be read.

She was a widow when the defendant married her, and had a considerable fortune.

James v. Perkins
6 Sim. 582.

Several depositions were read of the husband's cruel usage.

Eedes v. Eedes
11 Sim. 569.

The plaintiff, upon her marriage with the defendant, trusted him to draw up a bond with his own hand to secure seventeen hundred pounds for the wife, in case she should survive him.

James v. Perkins
11 Sim. 575.

He likewise entered into a bond for paying five hundred pounds to the plaintiff's sister, for prevailing upon the plaintiff to marry the defendant.

James v. Perkins
2. James v. Perkins
599.

Depositions were offered on the part of the defendant charging very high provocation; as for instance, the plaintiff's drawing in the defendant to admit one *Ralph Cox* into his house, whom he soon after perceived to hold a stricter correspondence with the plaintiff than he ought to have done, and that upon his admonishing her in a very mild manner, she flew into a very great passion, and left the house; and that the defendant went to her, and intreated her to return, and offered to forget every thing that had passed; and that the husband, upon her refusal, broke open the plaintiff's cabinet, and took out the seventeen hundred pound bond.

William v. Wilson
1 Clk. & F. 530
N. S. 530

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LORD CHANCELLOR said, the Court will not suffer any depositions to be read to prove a criminal conversation against a wife, unless it is expressly charged by the husband's answer, and made part of his defence and excuse for ill usage of her, and was denied in the case of *Sidney* versus *Sidney*, 3 *Wms.* 269 (1); but it being charged by the answer in this case, that she behaved in a very indecent manner with one *Cox*, he thought it sufficient for the defendant to read evidence against the plaintiff of criminal conversation, for it is not necessary to make the charge in gross terms, but sufficient as it is charged here for the Court to know what is aimed at by the answer.

Charging the wife has behaved in an indecent manner, will intitle the husband to read evidence against her of criminal conversation.

The depositions were then read for the defendant, suggesting that the plaintiff held a private and unlawful correspondence with *Ralph Cox*, one of the plaintiff's witnesses, and likewise to her being seen in bed with one *Davis*.

There appears to me to be a sufficient ground for this court to direct an inquiry what estate the defendant has, to make sa-

Though a husband has imposed on a wife, by giving her a bond

void at law, yet this court will establish the agreement according to the intention of the parties.

(1) *Moore v. Moore*, ante 1 vol. 276. *Clarke v. Periam*, post. 337.
satisfaction

WATKINS v.
WATKINS.

tisfaction for imposing upon the plaintiff at the time of the marriage; for if there be fraud and imposition on the part of the husband, this court will interpose, and make the agreement according to the intention of the parties, and though the bond may be void in law, yet the Court will establish it in favour of the plaintiff (1).

This court will not allow a wife maintenance where there is full proof of her elopement and adultery.

The great objection is the elopement and adultery of the wife and that the Court will not give any maintenance to a wife who misbehaves in this manner; and it is true, upon full proof of such behaviour, that they will not allow the wife any thing for maintenance (2).

Where a witness is under a necessity of exculpating her own behaviour first, no regard ought to be paid to her evidence, against the conduct of others.

But the evidence here is not quite full, though in one of the depositions a witness indeed goes so far as to say, that she saw her mistress in bed with one *Daws* between the first and second marriage, but I do not much like the account this witness gives of herself, that she lived as a servant to the plaintiff before the second marriage, and notwithstanding she saw this improper behaviour in her mistress, yet she did not think it wrong to live on with the plaintiff even after her second marriage; and where a witness is under a necessity of first exculpating herself, no regard ought to be given to her evidence.

On the plaintiff's side there is very strong and substantial evidence of her being cruelly and barbarously used.

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On the defendant's side very loose and trifling with regard to this point, for there is evidence only of persons who now and then came into the family, which amounts to nothing at all, for a husband and wife may live very unhappily together, and have notwithstanding, prudence enough to keep within bounds before strangers.

I can do no more in this case than Lord Chancellor *King* did in the case of *Colemore* and *Colemore* (3), when he framed his decree by way of analogy to the writ of *ne exeat regno*, and impounded the fortune of the husband for the wife's maintenance till he should think proper to return.

I must declare the bond to be an imposition, and that the money ought to have been secured to her to be paid out of her own fortune, in case she survived him; I must likewise refer to a Master to take an account of the personal estate of the plaintiff before her marriage come to the hands of the defendant since the marriage, or to any other person by his order and for his use, and so much of it as remains in specie of capital and principal money arising out of such estate and effects, to be placed out in real or personal securities, in the name of a trustee to be approved of by a Master, in trust to pay the interest arising therefrom in such manner as is hereafter mentioned during the joint lives of the plaintiff and the defendant; and in case the defendant shall die in the life-time of the plaintiff, then to the

(1) *Vide Gage v. Aston*, Com. 67.
1 *Salk.* 325. *Cammel v. Buckle*, 2 *P. W.*
243. *Aston v. Pearce*, 2 *Vern.* 480.
Tyrrel v. Hope, *post.* 561. *Stoit v. Aylott*,

1 *Cha. Rep.* 60. *Beard v. Beard*, *post.*
3 vol. 72.

(2) *Moore v. Moore*, *ante* 1 vol. 276.

(3) *S. C.* cited *post.* 3 vol. 296.

cure the sum of 1700*l.* the principal money in the bond to be paid to the plaintiff within six months after the defendant's death.

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WATKINS.

And, as it appears to the Court, the husband has possessed himself of the greatest part of the wife's fortune, and is gone out of the kingdom without leaving a provision or maintenance for her, I decree that the interest arising from the trust money shall be paid to her, till he thinks proper to return and maintain her as he ought, and decree the defendant to pay costs (1).

The husband having left the kingdom, interest out of trust money directed to be paid to the wife till he thinks proper to return, and

maintain her as he ought

(1) *Reg. Lib. B.* 1740. fol. 67. But notwithstanding this case and that of *Williams v. Callow*, 2 *Vern.* 752. it seems that the Court of Chancery cannot compel the husband to pay a separate

maintenance to the wife, unless upon an agreement between them, or after a divorce in the ecclesiastical court. See *Head v. Head*, *post.* 3 vol. 547. 550. *Fonblanque's Treatise of Equity*, 1 vol. 96.

Walker versus Walker, December 10, 11, 1740.

Case 92.

JOHN Walker, the eldest brother of the family, being pretty near his end, applied to *Thomas Walker*, the plaintiff, and to his sister, who had solicited him to do something for them, and told them, if you will surrender your copyhold estate, as you have no children of your marriage, for the benefit of your brother *Ralph Walker*, the defendant, I will secure an annuity of 5*l.* per ann. for your life, and an annuity of 2*l.* 10*s.* for your sister: the plaintiff did agree to the terms, and promised to surrender his copyhold estate; upon which *John Walker* surrendered his copyhold estate to the defendant, charged with these annuities; the defendant refuses to pay them, unless the plaintiff will surrender his own copyhold estate pursuant to his promise to *John Walker*.

S. C. Barn. c. 214.
S. C. cited 1 Ves. 251.

The question was, Whether parol evidence may be admitted on the part of the defendant (as there was no written agreement between him and the plaintiff) to establish a fact: the defendant may be admitted to read

parol evidence, to rebut the equity set up by the bill.

The question (as there is no written agreement of this transaction between *John Walker* and the plaintiff) if parol evidence may be admitted to establish this fact.

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Mr. Chute, of counsel for the defendant, insisted, that a man who comes into a court of equity ought to have clean hands, and to do equity by surrendering his copyhold lands pursuant to his agreement with *John Walker*: and upon the general doctrine that parol evidence may be admitted to rebut an equity, cited the following cases; *The Countess versus The Earl of Gainsborough*, 2 *Vern.* 252. *Eq. Ca. Abr.* 230. *Oldham versus Litchford*, 2 *Vern.* 506. *Eq. Ca. Abr.* 231. *Gascoigne versus Thwing and others*, 1 *Vern.* 366. *Malabar versus Malabar*, before Lord Chancellor Talbot, *Cases in his Time* 78. The defendant was heir at law both to *John Walker* and the plaintiff.

LORD CHANCELLOR,

There are a great many instances in this court where parol evidence will be admitted to be read to rebut an equity set up by the

Att. Gen. v. Litchford
4. c. Callow. 5
Padmore v. Gains
7. Scurious Sh.

WALKER v. WALKER.

the plaintiff, in the case of resulting trusts (1); and then it will come to this, if a plaintiff has failed at law, as the present has been done, and comes into this court for equity, whether the defendant shall not be admitted to read this parol evidence to rebut the equity the plaintiff sets up by this bill.

I am very clear of opinion, that such evidence ought to be admitted here, and would be a great injustice to the defendant if it was not.

The defence arises here from the imposition of the plaintiff, and therefore not affected by the statute of Frauds and Perjuries.

It is not rightly stated when it is said, the evidence to be read here is in support of an agreement, but may more properly be said to be a defence arising from the fraud and imposition of the plaintiff, and has nothing in the world to do with the statute of Frauds and Perjuries.

Here is a surrender in pursuance of an agreement, with an annuity charged upon the defendant, the surrenderee for the plaintiff's benefit, and he refusing to perform his part, is not the case in such a case as the Court will relieve?

Where a person advancing money, refuses, after an absolute conveyance, to execute a defeasance,

Suppose a person who advances money, should, after he has executed the absolute conveyance, refuse to execute the defeasance, will not this court relieve against such fraud (2).

execute a defeasance, this court will relieve.

The agreement as set forth in the defendant's answer is proved by three witnesses in the fullest manner, and their being relations is no objection to their competency. Four pounds per annum is the value of the copyhold estate, which the plaintiff, according to his agreement with *John Walker*, was to surrender the inheritance of, subject to his own and his wife's life.

[100]

The question is, Whether the plaintiff is intitled to have the aid of a court of equity, to recover the annuity which he has failed in at law?

I am of opinion that the plaintiff is not intitled to have the aid of a court of equity, and that it would be contrary to the rules of justice; for it appears to me plain, that *John Walker* intended to grant these annuities or rent-charges conditional only.

It was held to be a defective charge at law, and therefore the plaintiff comes into this court, suggesting it to be an equal charge.

The defendant insists that he ought not to have the aid of a court of equity, to supply this defect, unless he will do equity in performing his part of the agreement, by which he drew *John Walker* to surrender his copyhold estate charged with the annuities.

- (1) *Gainborough v. Gainborough*, 2 Vern. 252. *Granville v. Braufort*, 2 Vern. 648. *Wingfield v. Alkinson*, 2 Vern. 673. *Littlebury v. Buckley*, 2 Vern. 677. *Batchelor v. Searle*, 2 Vern. 736. *Petit v. Smith*, 1 P. W. 9. *Heron v. Newton*, 2 P. W. 160. 9 Mod. 11. *Rutland v. Rutland*, 2 P. W. 210. *Bradbridge v. Woodroffe*, ante 69. *Ulrick Litchfield*, post. 373. *Robinson v. C*, 1 Ves. 253. *Blinkborn v. Feast*, 2 Ves. Lake v. Lake, Amb. 126. 1 Wilf. 3 S. C.
- (2) *Maxwell v. Montacute*, Prec. C 526. *Young v. Peachy*, post. 258. *Jo v. Statbam*, post. 3 vol. 389.

The material part of the defendant's evidence is, that in three days after *John Walker's* surrender, the plaintiff declared, I have *John Walker* fast, but he shall not have me fast.

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Neither the fact is charged by the defendant's witnesses, nor the credit of the witnesses impeached by the plaintiff's evidence.

The steward of the court examined for the plaintiff, and concerned in the transaction, swearing, that at or before the time of the surrender, he never heard of the agreement insisted on by the defendant, is a manifest evasion, and a negative pregnant that he heard of it after the surrender.

The steward swearing he never heard of the agreement at or before the surrender, is a negative pregnant, that he heard of it after,

The plaintiff, for these reasons, is not intitled to relief in this court, for supplying the defect of a legal conveyance, but it is rebutted by the equity set up by the defendant.

I am not at all clear, whether, if the defendant had brought his cross bill to have this agreement established, the Court would not have done it, upon considering this in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other, and the defendant would have had the benefit of it as an agreement (1).

Where a part of the agreement is performed on one side, it is just it should be carried into execution on the other.

The allowing any other construction upon the statute of Frauds and Perjuries, would be to make it a guard and protection to fraud, instead of a security against it, as was the design and intention of it.

Decreed, No costs on either side (2).

(1) See *Lacon v. Mertins*, post. 3 vol. 4. note.

(2) *Reg. Lib. B.* 1740. fol. 47. Bill. dismissed.

Stanton versus Stone and others, December 10, 1740, at the Rolls, before Mr. Justice Wright. [101] *Nice*
3. 1. 18 C. 162 *Cafe 93.* *or*
Stanton

A Surrender of a copyhold estate to the husband for life, to the wife for life, and to the heirs of the bodies of the husband and wife, remainder in fee to the survivor, did not vest an absolute estate-tail in the wife, who survived, but only gave her an estate-tail *after possibility of issue extinct*, and the estate-tail vests in the person who is the heir of the body both of husband and wife (1).

A copyhold surrendered to the husband for life, to the wife for life, remainder to the heirs of the bodies of husband and wife, remainder in fee to the survivor,

gives to the wife, who survived, an estate-tail only, after possibility of issue extinct, and the estate-tail vests in the heirs of the husband and wife.

In

(1) *W. Neighbour* in 1729, surrendered the copyholds in question to trustees (who were never admitted) and to their heirs, in trust for himself for life, remainder to his wife *Mary*, and the heirs of her body. This settlement was made after marriage. *W. Neighbour* died, and

Mary survived. These copyhold premises were mortgaged to the plaintiff in 1733, and his surrender was renewed in 1735 and 1736. The lord of the manor had refused to admit the mortgagee, and gave him notice of the prior surrender. The mortgagee now brought his bill; when

SUTTON v. STONE.
The same construction takes place in copyholds, as in other law conveyances.

In the cases of surrenders of copyhold estates the same construction must take place as in all other conveyances at law. So held in *Idle versus Coke, Holt's Cases* 164 (1). by the Court, that a limitation of uses in a copyhold surrender must be construed by the same rules, as if it were a limitation in other conveyance at common law (2); and that the intent of the party is not sufficient, as in a will.

Where there is a clear tenancy in tail, there is no occasion for the remainder-man's being a party to a bill of foreclosure if there is an express estate for life, the remainder-man ought to be a party.

Before admittance, a mortgagee may bring a bill of foreclosure, and after a decree, an ejectment for the possession of the premises.

A mortgagee who is not in possession, may bring his bill against a mortgagor before admittance for a decree of foreclosure, and after he has obtained such a decree, may bring his bill for the possession of the mortgaged premises.

The mortgagee here has brought his bill against a mortgagor to compel him as tenant in tail to make a good title by suing for a recovery (3).

I do not apprehend said Mr. Justice *Wright*, that this will point out what title the mortgagor shall make, but will decree him to make such title to the mortgagee as he is capable of doing, and therefore I direct a good title to be made by the defendant to the plaintiff, and the principal, interest, and costs of the mortgage to be paid in six months, or the defendant to be absolutely foreclosed.

Though the plaintiff has not replied to the defendant's answer, yet desiring him to do an act, will intitle the defendant to his costs to be taxed.

Where there is no replication to the answer, a defendant is intitled only to costs according to the course of the court notwithstanding the plaintiff has not in this case replied to the answer of the lord of the manor, yet desiring an act to be done by the lord, *videlicet*, the admitting him to the copyhold estate, he must pay this defendant costs to be taxed by a Master (4).

when it was decreed, that the settlement was fraudulent against the plaintiff, and that he should be admitted under the said surrender: but upon payment of the mortgage-money and interest, the plaintiff was to re-convey the premises to *Stone* and his wife, who was formerly the widow of *W. Neighbour*. *Reg. Lib. B.* 1740. fol. 70. See Mr. *Fearne's* observations on this case. *Essay on Cont. Rem.* 44 *Ed.* 3.

(1) 1 *P. W.* 70. *S. C.* See *Fisher v. Wigg*, 1 *Cox's P. W.* 14. n. 1. *Rigden v. Vallier*, 2 *Vesf.* 257.

(2) Copyhold estates are not within the statute of *Uses*, 27 *Hen.* 8. *Cro. Car.* 44. 2 *Vesf.* 257.

(3) In *Tourle v. Rand*, 2 *Bro. Cha.* 650. Lord *Thurlow* observed, that a tenant in tail mortgage, the covenant for further assurance may be taken here as a plank. See *Edwards v. Appleby*, in note, *ibid.* 652. *Pye v. Dutton*, 3 *Bro. Cha. Rep.* 595.

(4) See *Newsham v. Gray*, *post.* 2

well versus *Perkins*, December 15, 1740, at the Rolls Office, Case 94.
before Mr. Justice William Fortescue.

Doc. olim Herbert & Thomas
3 Ad & Ellis. 127.

THE will of *John Hitchins*.

"Item, all those my freehold lands and hop-grounds with the messuages or tenements, barns, &c. now in the tenure and occupation of the widow *Leach*, and all other the best and residue and remainder of my estate, *consisting in ready money, plate, jewels, leases, judgments, mortgages, &c. or in any other thing whatsoever or wheresoever* (1), I give unto my dearly beloved *Arabella Hitchins* and her assigns for ever."

All my freehold lands in the tenure of the widow *L.* and the residue of my estate, consisting in ready money, plate, jewels, leases, judgments, mort-

&c. or in any other thing wheresoever or whatsoever, I give to *A. H.* or her assigns for ever. *car: will intend an intestacy in favour of the heir at law, unless there is a clear intention to pass the estate.*

Monks. Mawdsley
1 Simon. 286.

the question is, Whether the residue passed to *Arabella* or

there is no doubt but the words, *to Arabella and her assigns* ever, will carry the fee to her without the word *heirs* (2).

Evans & Lang
J. B. Ellis
719.

It has been insisted for the plaintiff, that the words in the preamble of the will "*as touching the temporal estate with which both pleased God to bless me, I give, bequeath, and dispose of as follows,*" shew plainly the testator's intention to dispose of his real estate, and that the Court will never intend an intestacy by part; and that the word *estate* will include lands as well as personal estate, and though coupled with words applicable to real estate, yet will pass freehold.

Spencer
Buckner
6. Simon. 286
610

though it would have been stronger if the word *real* had been added, yet however this will not do, unless there are some words that shew the intention to pass the real estate, or the Court intend an intestacy in favour of an heir at law.

Trudeau
Lainchburg
11. East 290

The word *estate* itself indeed may include as well real as personal; yet when the testator has expressed himself by such words as are applicable to personal only, I cannot intend he meant the real estate (3).

Harrell
Spencer
5. B. & Ald.
18

Whatsoever and wheresoever must be confined to the things personal, and is restrained to the hop-grounds and leaseholds; and he intended to give his wife all his real estate, why did he say only the *Essex* estate.

Gallico
11. East
J. B. & Ald.
267

Real estate, where it is only coupled with things that are personal, shall be restrained to personals. *Vide Wilkinson and Mercam, or Island, Cro. Car. 447. 449. Sir W. Jones Rep. 380.*

[103]
Downport v. Colman
12. Sim. 588
The Marquis of Stafford

The state of this case as it stands in *Roll's Abridgment* 334. b. "That if a man seized in fee of any lands, and also possessed of certain leases of lands, devises the leases to *J. S.* and then devises to his executor all the residue of his estates,

(1) These words in *Italics* do not appear in the Register's book.

(2) See the case of *Ridout v. Payne*, post. 3 vol. 486.

(3) *Co. Litt. 9. b. Chamberlayne v. Gwyer, Cro. Car. 129.*

Ind. Southern
7. B. & Ald.

TIMEWELL v. PEAKINS.

"mortgages, goods, &c. his debts paid and funeral expence discharged; this will pass a fee to the executor by the word *estates* being coupled with the word *goods*." *Hill. 10 C. B. 4*
wards & Barnes
King: N.C. 252. between *Wilkinson* and *Meriam*, *per cur.* upon a special verdict but it appears to have been otherwise determined on searching the record of the judgment.

Infant v. Hanbury
Morr. 29.

For d. Mass

Sarab

Mess. & W.
 450

where & H. & S.

14 Boar. 626.

A devise of plate, jewels, linen, household goods, and coach and horses, will be confined to things of the same nature, and goldsmiths' notes, and bank bills, do not pass by those words.

I think the present case is stronger, because though the word *possessed* is not mentioned, yet there are other words which make it stronger; for here the word *estate* is expressly confined to personals, as plate, jewels, rings, judgments, mortgages, &c. which are all personal estate, and therefore I think the residue of the real estate does not pass.

But supposing it would admit of a doubt, yet certainly the heir at law ought to be preferred, unless the intention of the testator to exclude him appears exceeding plain.

Arabella Timewell's will.

"I give to *Mary Timewell* all mortgages, ground-rents, judgments, &c. whatever I have or shall have at my death, plate, jewels, linen, household goods, coach and horses for her use, that no husband shall meddle with them, and death to give them to whom she pleases.

"Item, I give my houses in *Broad-street* and *Throgmorton* to *Sarah Timewell* for her own use, to give away at her death to whom she pleases.

"Item, I give to *Sarah Perkins* my freehold estate in *Essex* to dispose of to whomsoever she pleases, and my two houses at *Croydon*, it being all freehold, for her own use, and if I should have children, for her to give to them as she pleases but if she die leaving none, to *Mary Timewell* and her children."

At the last part of the will she says, "I think I have given them as equally as I can, and hope my two daughters will live in great harmony and friendship together."

One part of the will relates to *Sarah Perkins*; as to the land in *Essex* and the houses in *Croydon*, it does not appear to me clear what estate *Sarah Perkins* has; but whether she has an estate for life with a remainder to her children, or whether she has an estate-tail with a power of disposing as she pleases, is not necessary for me to declare now, as she has no children.

[104]

There is no doubt but *Mary Timewell* is intitled to the fee in those estates which are not expressly devised to *Sarah*.

I am of opinion the goldsmiths' notes and bank bills did not pass by the will to *Mary Timewell*; for though there is no doubt but the general words, *whatever I have or shall have at my death* would have passed them, yet the particular words which follow as plate, jewels, &c. confine and restrain them to things of the same nature, and so laid down in the case of *Trafford* and *Beridge*,* and therefore as they do not pass they must go equally between the two sisters.

* A man devised to his niece all his goods, chattels, household-stuff, furniture, and other things which then were, or should be in his house at the time of his death.

It has been said, that as the testatrix has expressly devised *the ground rents* to *Mary Timewell*, the defendant *Sarah Perkins* is bound by it, because she herself takes by another part of the will, and for that reason she cannot except to particular *devises*, but must take the will in the whole.

But this argument will not hold here, for it is not a particular ground-rent that is devised, and as the testatrix might have other ground-rents of her own to satisfy this part of the will, I shall intend it so; and besides it is impossible she could give away to *Mary* from *Sarah* what was *Sarah's* inheritance from her father (1).

and some time after died, leaving about 265 *l.* in ready money in the house; and it was decreed that *this ready money* did not pass, for by the words *other things* shall be intended things of like nature and species with those before mentioned. *Mich.* 1729. between *Trafford* and *Berrige* (2).

(1) *Reg. Lib. B.* 1740. fol. 141.

Boon, 2 *Ves.* 279, 280. *Robert v*

(2) 1 *Eq. Ab.* 201. pl. 14. *S. C.* *Cook v Kyffin*, post. 113.

v. Oakley, 1 *P. W.* 303. *Cornforth v.*

Ridout versus *The Earl of Plymouth* and others in the Paper of Exceptions, December 16, 1740.

Ex parte G. v. D. & Chetty

THE question was, whether jewels, rings, pictures, dressing plate and other trinkets, given to Mrs. *Lewis* prior to her marriage, belong to her as her separate estate, and the husband is to be considered only as a trustee for them: and as to things given after the marriage, *videlicet*, mourning rings, family pictures, &c. whether they shall not be retained by Mrs. *Lewis* as too trifling to be called the personal estate of the husband.

S. C. ante 1 vol. 269.

Where a husband's personal estate is not sufficient to pay his debts, a wife cannot set up any claim to jewels, rings, pictures, dress-

ing plate and other trinkets given her before marriage (1).

LORD CHANCELLOR.

It is a very unfortunate and a very hard case, that Mrs. *Lewis* should be stripped of these things.

She claims them in two lights, 1st. as paraphernalia, and in that respect she certainly is not intitled, where the assets of the husband are not sufficient to pay his debts, nor is there any trust upon the real estate for payment of debts (2), so that she cannot stand in the place of creditors, and be allowed for her paraphernalia out of the real estate; and there is no case which has carried it so far as to let the widow come upon the real estate at all events to be satisfied her paraphernalia.

[105]

Where there is no trust on real estate for payment of debts, a widow cannot come upon it at all events, to be satisfied her paraphernalia.

The two things relied upon are, that the husband shall be considered as a trustee for the things given to the wife previous to the marriage; but it will be impossible to maintain this, because though she had an absolute property in the jewels, &c. by virtue of the gift before marriage, yet, immediately upon the marriage, the law gives them the husband, and where his personal estate is not sufficient to pay his debts, a wife cannot set

(1) See *Snellson v. Corbet*, post. 3 vol. 369. (2) *Noribey v. Noribey*, ante 79.

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PLYMOUTH.

up any claim, nor can I possibly consider him in the light of trustee for such jewels (1), &c. as were given previous to marriage, as it would be a manifest prejudice and fraud upon the creditors.

There is no pretence for considering the things given after marriage as the property of the widow, but she shall be allowed to be a purchaser of them, at the value set upon them by Master, none of the parties opposing it (2).

The Attorney General, upon the consideration of the greater of the debts, submitted it to the court, that the real estate should be sold, and the money arising from the sale applied a course of administration.

The words of Mr. Lewis's will are, "that the trustees should by perception of rents and profits, or by leasing or mortgaging the same, raise and levy the said sums and legacies made payable out of the said lands, amounting to 30,000*l.* and should pay the same in such manner as is therein before mentioned."

LORD CHANCELLOR.

Debts and legacies are by a will directed to be raised by perception of rents and profits, or by leasing or mortgaging of the land; this restrains it merely

Where a man creates a trust for payment of debts, and declares the trust of that term to be, by perception of rents and profits, or by leasing, or by mortgaging, to raise sufficient money for the payment of his debts, it restrains it merely to a payment out of rents and profits; if it had been a trust of *the real estate and profits*, the term might have been sold for the satisfaction of the creditors (3).

to a payment out of rents, and the court cannot decree a sale.

Besides, if the court would consent to decree a sale of the term, people are not fond of buying a term, though for 20 years; and then it would not answer the end proposed, because it would not raise a sufficient fund for the payment of the debts.

[106]

Where there are other limiting words following rents and profits in a trust for payment of debts, I do not remember a case which will authorize me to direct a sale.

Lord Hardwicke recommended it to the parties to apply for a private act of parliament to obtain a sale of the testator's real estates.

In respect of several difficulties appearing in this case, as relating to the interest of the Earl of Plymouth as of the creditors and legatees of the testator, Thomas Lewis; Lord Chancellor recommended it to the parties in the mean time to make a private application for a private act of parliament in order to obtain a sale of the testator's real and leasehold estates, or so much thereof as shall be sufficient for the satisfaction of the several charges thereupon (4).

(1) *Vide Countess of Cooper's case*, cited *post*. 3 vol. 393.

(2) *Reg. Lib. B.* 1740. fol. 35.

(3) So *Bath v. Bradford*, 2 *Vesf.* 590. *Lingard v. Derby*, 1 *Bro. Cba. Rep.* 311.

Silk v. Prime, *ibid.* note. *Sed. Hughes v. Doulsen*, 2 *Bro. Cba. Rep.* 6

(4) *Reg. Lib. B.* 1740. fol. 35.

Adams versus Gale, in the Paper of Exceptions, December 16, Case 96.
1740.

A Person who was executor under a will was likewise a creditor by note payable on demand; the question was, Whether as he could not possibly make a demand of interest upon himself, he shall not by the equity of this court be intitled to be allowed interest.

A debtor leaves a creditor by note on demand, his executor, this court will not allow him interest for it, because he may

turn money to his own advantage, which is coming in by the testator's assets.

For the plaintiff, who was a legatee under the will, a case was cited of *Hacknott and Webber* in 1728, before Lord Chief Justice *Egges*, where an action was brought upon two promissory notes payable on demand, and judgment by default, and a writ of inquiry of damages was awarded, and interest given by the jury from the date of the notes; the judgment upon the writ of inquiry was set aside for this reason, as interest is not due upon promissory notes, unless there is an actual demand of interest; and said by the court, that it was the constant rule in cases of this nature, at *nisi prius* (1).

LORD CHANCELLOR.

I do admit it to be a case in which the defendant could not recover interest at law, because in the life-time of the testator he made no demand of interest, and since the death of the testator he is incapable of doing it, by being left executor.

As an executor may make use of money which is perpetually coming in by assets of the testator, and turn it to his own advantage (2); and as it is not improper for an executor to do it upon his own account, where he is a responsible man, and ready to answer legacies and debts when called upon; therefore I do not think it right to allow interest for the note.

- (1) *Eat v. Thornbury*, 3 P. W. 127. *Perkins v. Baynton*, 1 Bro. Cha. Rep. 375.
arg. *Foster v. Foster*, 2 Bro. Cha. Rep. 616.
(2) So *Child v. Gibson*, post. 603. *Littlehales v. Gascoyne*, 3 Bro. Cha. Rep.
Contra, Horsley v. Chaloner, 2 Ves. 85. 73. *Franklin v. Friith*, 3 Bro. Cha. Rep.
Newen v. Bennet, 1 Bro. Cha. 359. 433.

Higgins and others versus The York Buildings Company, December [107]
20, 1740. *Expansile Bignold* Case 97.
L. D. Chetty 259

THE York Buildings company set up a deed of trust of the estate in question, which at the hearing of the cause was declared to be a fraudulent conveyance against the plaintiffs, S. C. ante 44. Semb. This court only removes fraudulent conveyances out of the way, but will not decree profits back against the original debtor and owner of the estate, received pendente lite, in favour of judgment creditors, from the filing of the bill.

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BUILDINGS
COMPANY.

who are judgment creditors; the substance of the petition now on behalf of the creditors, is, that as the court have declared this deed to be void, they are intitled to an account of profits from the *York Buildings Company* of this estate, who have received them *pendente lite*, and that the company may account for such pernancy of profits from the time of filing the bill.

LORD CHANCELLOR.

If it had not been for the conveyance which has been made by the members of the company for their own benefit, the plaintiff might have had the remedy of an *elegit* at law, but that would have intitled him only to a moiety; but there being more judgment creditors than one, gives the court a handle to decree an account of the profits of the estate from the time of the decree.

The most usual case in this court is a judgment creditor's coming here against an heir at law for an account of rents and profits received by him, being considered as assets of the ancestor; for if he brought an action of debt, he would have judgment for the full value of the estate, and therefore the courts of equity make their decrees conformable to the judgments at law (1).

In the case of a mortgagee, where a mortgagor is left in possession, upon a bill brought by the mortgagee for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor, for any of the years back during the possession of the mortgagor.

Suppose there is a trust-estate which does not amount to a fraudulent conveyance by the party, the statute of Frauds and Perjuries will help to make the estate liable to an execution notwithstanding.

I do not know in the case of fraudulent conveyances, that this court have ever done any thing more than remove such fraudulent conveyances out of the way, nor are there any cases that I can find of decreeing profits back, against the original debtor and owner of the estate, received *pendente lite* in this court, in favour of judgment creditors from the filing of the bill, nor any instance of a decree for a sale; but equity follows the law, and leaves them to their remedy by *elegit*, without interfering one way or the other.

(1) *Vide Stileman v. Ashdown, post. 609.*

[108]
Case 98.

Though executors are not to pay costs, yet they shall not be allowed any, because they are supposed to reimburse themselves by the credit they take in the account kept by them.

Humphrys versus Moore, December 13, 1740.

PER curiam: executors and administrators who are brought before the court for an account of assets though they are not to pay costs, yet they shall not be allowed any, because they are supposed to reimburse themselves any charges or expences they may have been at, in the account of a testator's or

intestate's

intestate's estate, which is always kept by executors or administrators (1). HUMPHREYS v. MOORE.

(1) *Fide* 1 *Eq. Ab.* 125. note (a). *post.* 126. *Wilkins v. Hunt*, *post.* 151. *Twifain v. Thelwell*, *Hard.* 165. *Sandys v. Humphry*, *Morse*, *post.* 408. *Johnson v. Welfen*, *ante* 80. *Hide v. Haywood*, *Peck*, 2 *Ves.* 465. *post.* 3 vol. 773. S. C.

Lloyd versus Williams, came on upon Exceptions, January 13, Case 99. 1740.

MR. Anwell by his will in 1699 creates a trust term of twenty-one years for the payment of debts and legacies, and declares by his will that he would have his debts and legacies paid within five years after his death. S. C. Barn. Cha. 224.

payment of debts and legacies to be paid within five years after his death, and by a codicil devises the same estates to trustees and their heirs to pay the wife during her life 300*l.* *per ann.* and with the surplus profits his debts and legacies. The testator's widow did not die till 1736; the question was, Whether a legatee for 20*l.* and a simple contract creditor for 76*l.* 9*s.* are intitled to interest upon the legacy and debt, and from what time. Lord Hardwicke held that interest on the legacy began at the expiration of the five years, and allowed interest on the debt only from the time it was ascertained by the Master's report, and confirmed in 1717. A. by will in 1699, creates a trust term of 21 years for the

And in a subsequent clause, he declares that the trustees of these estates upon the term of twenty-one years shall have a power to lease or mortgage them if the heirs refuse to pay their debts, legacies, and funeral expences, till the debts, &c. are paid.

By his codicil he devises the same estates to trustees and their heirs, and directs them during the life of his wife to receive the rents of his estate, and thereout to pay to the wife 300*l.* *per annum*, and with the surplus profits to pay his debts, legacies, and funeral expences with all the speed that can be.

The testator's widow did not die till 1736.

The question upon exceptions to the Master's report was, Whether a legatee for 20*l.* and a simple contract creditor likewise for 76*l.* 9*s.* who lent part of it to the testator, and paid the rest by the testator's direction in discharge of a bill of funeral expences, is intitled to interest upon his legacy and debt, and from what time, whether from the five years after testator's death, or from 1717, the time when the Master's report of the sums due for the legacy and debt was confirmed.

It was insisted by the counsel for the trustees that this was a dry reversion, and that there was no fund, if the estates had been sold, to pay debts, legacies, and funeral expences, till the death of the widow in 1736.

LORD CHANCELLOR,

This question arises on the will and codicil of Mr. Anwell.

In favour of creditors the Court would have construed the subsequent clause to the creation of the trust term of 21 years, which begins with ("as touching and concerning the aforesaid lands and premisses devised in trust, in case my heir shall refuse to pay debts, &c.") as a charge upon the inheritance for payment

*These
Cousins
L. Beau
367.*

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WILLIAMS.

payment of debts, legacies, and funeral expences; if it stood as it does upon the will only.

But then comes the codicil, which makes a very great alteration; for here the testator has charged those very estates with annuities to the wife and other persons, and afterwards follows the clause relating to surplus profits, and when the debts are satisfied out of those profits, then the residue to be paid to such person as shall be intitled to the inheritance.

This cannot, as has been contended, be confined to the surplus rents and profits during the life of the wife only, but must likewise run on against the owners of the inheritance: and the Court already, by a former decree, have determined these points, for it directs the annuities to be paid first, and the estates to be sold for payment of debts.

The present question as to the legacy and debt carrying interest, and from what time, will fall under different considerations.

I do not know, though it may sound oddly in a court of equity, whether the question applied to the legacy does not come out to be the clearest case; for as it is a general legacy, if there had been no time limited for the payment, it would have been due within one year after the death of the testator with interest, to be computed from the expiration of the year (1); and if the personal estate be not sufficient, the reversionary estate is charged with it.

Indeed if a legacy is given out of a real estate, and expressly charged upon it, there might have been a considerable question, whether it should have been paid till the real estate fell in.

The next question, with regard to the legacy, is, from what time the interest shall be computed.

[110]

A legacy in its nature carries interest, and there is no distinction between a reversionary estate and any other.

A legacy does in its nature carry interest, and I know of no distinction between a reversionary estate and any other, and the time of payment of interest in this case ought to begin at the expiration of the five years according to the directions of the will (2).

Ld. Hardwicke declared he knew of no general rule that on a trust created for the payment of debts, simple contract ones shall carry interest (3).

The remaining question will be with regard to the debts carrying interest, and from what time it shall be computed.

A debt by simple contract does not carry interest in its nature, nor will this court direct it to be paid, but then it is insisted, that in all cases where there is a trust created for payment of debts in general, that simple contract ones shall carry interest; now I must own that I do not apprehend there is such a general rule; for I can, upon my memory, say, that it is

(1) *Maxwell v. Wetenhall*, 2 P. W. 26. *Beckford v. Tobin*, 1 Ves. 308. *Bilson v. Saunders*, Bunb. 240.

(2) See *Heath v. Perry*, post. 3 vol. 101. and notes.

(3) *Vide Barwell v. Parker*, 2 Ves. 353. *Bath v. Bradford*, 2 Ves. 588. *Shirley v. Earl Ferrers*, 1 Bro. Cha. Rep. 41.

a frequent direction in this court for the Master to take an account of debts, and of such particularly as in their nature carry interest.

LLOYD v. WILLIAMS.

The case of *Car v. The Countess of Burlington*, 1 *Williams* 228. was a trust created in the life-time of *Richard Earl of Burlington*, empowering trustees by leasing of his lands in *England and Ireland* to pay all his debts which should be owing at his death.

Simple contract creditors shall stand in the place of bond creditors, and be allowed out of the

real estate equal to what has been exhausted out of the personal

When a trust is created for payment of all debts whatsoever, and bond creditors shall exhaust the personal estate, the Court will direct that simple contract creditors shall stand in the place of the bond creditors, and be allowed equal to what has been exhausted out of the personal, from the real estate.

Therefore I apprehend the reporter has been deceived; and this case is not rightly taken; for it says, "if the personal estate is not sufficient to satisfy bond creditors, they may still come in to be paid the remainder of their debts in proportion with the simple contract creditors."

In the case of *Maxwell v. Wettenhall*, 2 *Williams* 26 and 47. it is laid down generally, "that if a legacy is charged upon lands which yield rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profit from that time."

And the case says further, "that if a legacy be charged upon a dry reversion, here it shall carry interest only from a year after the death of the testator, a year being a convenient time for a sale."

But this does not determine that a dry reversion will be liable to simple contract debts and interest upon them.

Suppose a simple contract debt should be unliquidated, has it ever been determined that a debt of this nature when ascertained, shall have relation back to the time of the testator's death, and carry interest from thence?

[III]

Then it comes to this question, Whether there were such estates as yielded annual profits over and above the payment of annuities, which have been decreed to be prior charges, and to take place of the debts.

And it appears to me by the Master's report that there was not a farthing left after the several charges were satisfied, during the life of the widow, who did not die till 1736.

It would be going too far to say, that where a man creates a trust for payment of debts, that all debts shall carry interest though the land does not yield annual profits; on the other hand it would be extremely hard, that legatees, who are mere volunteers, shall have interest out of a reversion itself, and that a simple contract creditor shall have no interest at all.

Where the land does not yield annual profits, all debts will not carry interest out of a trust for payment of debts.

Lord Chancellor *Nottingham* decreed, that where a man devises lands for payment of debts and legacies, that they shall be paid *pari passu*. Lord *North* reversed that decree, and Lord Chancellor

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WILLIAMS.

Chancellor *Jefferies* in *Gosling v. Dorney* made the same decree with Lord *Nottingham*. 1 *Vern.* 482.

But this doctrine has been exploded since, for, as my Lord *Nottingham* said in another case, it would be making a man in his grave; and it is now the constant determination that creditors shall be preferred before legatees, where there is not sufficient for both.

As the debt in the present case was not liquidated and ascertained till the Master's report, which was confirmed by the Court in 1717, I shall allow interest upon it only from that time (1).

(1) The statement of this case does not appear fully in the Register's book, though the decree there agrees with this report of it. *Reg. Lib. B.* 1740. fol.

158. The will of Mr. *Arnwell*, and the proceedings in equity thereupon for more accurately stated in *Barn. Cha.* 22.

Case 100. *Scarborough* versus *Burton*, January 14, 1740, came on upon Exceptions.

S. C. Barn. Cha.
255.

COSTS in equity are intirely in the discretion of the Court; but where they think it would accelerate a decree, the Court chuses to postpone the consideration of the costs till the cause comes back from the Master, though there might be grounds enough for decreeing costs even at the hearing of the cause.

[112]

What I ground my direction upon in the present case is, the defendant's giving the plaintiff further trouble after the pronouncing of the decree, by intangling and perplexing affairs much as possible since in bringing a vexatious bill.

A plaintiff may apply for costs, where a defendant gives unnecessary trouble in carrying a decree into execution.

The proper construction upon such clauses in a decree (that if the defendant shall give unnecessary trouble in carrying it into execution) is, that the plaintiff may apply to the Court for costs every body knows that the costs which are given by a court on the dismissal of a bill, are not an adequate compensation for the expences a party is put to in such a vexatious suit.

Case 101. *Champernoon* versus *The Borough of Totness*, January 15, 1740, came on upon Exceptions.

Where there is a dispute as to boundaries or unity of possession, a defendant must set forth how he is intitled.

IT is true, said Lord *Hardwicke*, in general that a person cannot compel another to set forth by what title, and under whom he derives his estates, merely because his lands lie next to the plaintiff's; but where there is a dispute as to boundary or unity of possession, there a defendant must set forth in answer how he is intitled, especially when the defendant has thought proper to demur to this part of the bill.

Roberts versus Kuffin, January 15, 1740.

Cafe 102.

WHERE this court, said Lord Chancellor, by a decree give directions to a Master to examine accounts, and the parties are at liberty to surcharge and falsify, you are not merely confined to errors in fact, but you may take advantage likewise of errors in law.

to errors in fact, but may take advantage of errors in law.

S. C. Barn. Cha. 299.

A party who is at liberty to surcharge and falsify, is not merely confined

*Sutton & Sharp
J. Russell. 146
Brake & Jarne
7 Simons. 67*

Owen Roberts, in 1711, made his will to the following effect. I give to my son Thomas Roberts 200 l. secured by a mortgage on the estate of Mr. Marriot, and all the messuages, lands, and tenements for securing the same.

LORD CHANCELLOR,

This intitles the devisee to the principal only of the mortgage, and not to the interest from the time of the execution of the will, nor from the death of the testator, or any other time whatever.

A devise of 200 l. upon a mortgage passes the principal only.

If a man give three hundred pounds due upon a bond by his will, this does not carry the interest incurred in the life-time of the testator, because it is quite doubtful what it might amount unto, from the uncertainty of the time the testator might live after making his will.

A gift of 300 l. upon a bond does not carry the interest incurred in the testator's life-time.

Where there is a devise in express words, the construction in this court is, that subsequent general words shall not extend it further than the natural meaning of the preceding ones will do.

[113] A devise in express words, is not extended by subsequent general ones.

A. by his will devises to his daughter all goods and things of every kind and sort whatever which shall be found in her closet at the time of his death: the question whether 45 l. os. 7 d. in money found in it at his death will pass to the daughter by that devise.

Money will not pass by a devise of all goods and things of every kind, where the devisee has a money legacy at the

outset of the will.

LORD CHANCELLOR,

If this will had been construed strictly in law or equity, I am of opinion it would not have carried the 45 l. and 7 d. to the daughter, for in the outset of his will he gives her a money legacy, which must be presumed to be the whole he intended his daughter by way of money legacy; besides in the clause which is in dispute, goods are first named, therefore the subsequent word things must be confined to household goods, and what is of the same species (1), for it would be unnatural to extend it to money; a closet too is a very improper place to refer to for money, the testator would have certainly mentioned cabinet or bureau, or any other thing where money is usually kept, if he had intended a further bequest of money; but by referring to a closet, it is reasonable, to believe he meant furniture only, which the daughter made use of in the closet.

*Harcourt
Morgan
2. Keen 275*

(1) *Timewell v. Perkins, ante 102. 104. See also Moore v. Moore, 1 Bro. Cha. Rep. 127.*

ROBERTS v.
KUFFIN.

In equity as well as at law costs follow the justice of the demand. Vide post. 400.

A bill may be brought for errors in an account though settled for three or four years.

At law the costs follow the justice of the demand, and in the court the plaintiff shall likewise have his costs (unless circumstances arise which are an excuse on the part of the defendant where the plaintiff has succeeded in his demand, for he was under a necessity of coming into this court, or he must have lost his money.

Bringing a bill 3 or 4 years after an account is settled for errors in that account, is not too long a time, for bills of this nature have been brought after a much greater distance from the settling of the account (1).

(1) As to opening accounts, and surcharging and falsifying them, see *Vernon v. Faudry*, post. 119. *Barn. Cha. Rep.* 280. 305. *S. C. Sewel v. Bridge*, 1 *Vesf.*

297. *Earl Pomfret v. Lord Windsor*, 2 *V.* 482. *Pit v. Cholmondeley*, *ibid.* 56 *Brownel v. Brownel*, 2 *Bro. Cha. Rep.* 6

Case 103.

January 19, 1740, the last Seal before Hilary Term.

A plea must first be removed out of the way, before a plaintiff can have an injunction to stay proceedings at law.

WHERE a defendant has put in a plea to the plaintiff bill the plaintiff cannot move for an injunction to stay the defendant from proceeding at law till the plea by some means or other is removed out of the way; all that the plaintiff can do is to move that the plea may be accelerated, which the Court does accordingly by ordering it to be set down to be argued the next day of pleas and demurrers.

[114]

Case 104.

Gray versus Cockeril, Cause-petitions, January 20, 1740.

S. C. Barn. Cha. 264.

A clerk in court who lends money to the solicitor is not intitled thereby to detain a client's papers as a pledge.

A Clerk in court's lending a solicitor money to carry on a cause shall never intitle the clerk in court to detain the papers of the client as a pledge or mortgage for the money advanced to the solicitor, but he shall deliver them up to the party and get his money from the solicitor the best way he can (1).

(1) Vide *Farewell v. Coker*, 2 *P. W.* 460. *Anon.* 2 *Vesf.* 25. *Taylor v. Lewis*, p. 3. vol. 727. *Jackson v. Butler*, post. 307.

Case 105. *Burton versus Mattons*, in the Paper of Petitions, January 1740.

S. C. Barn. Cha. 401.

A minister of a parish prevents an order for a defendant's appearance being published pursuant to the 5 *Geo.* 2. he is indictable for a contempt.

THE statute of 5 *Geo.* 2. c. 25. requires "that (upon affidavit of a person's being gone out of the kingdom avoid being served with the process of this court) the copy of the order of Chancery, directing such defendant to appear on a certain day therein to be named, shall within 14 days after such order made, be inserted in the *London Gazette*, and published on some Lord's day, immediately after divine service in the church of the parish where such defendant made his usual

"usual abode within thirty days next before his absenting;" and if the minister of that parish prevents its being published as the act itself is silent, nor mentions any penalty for his disobeying it, I am of opinion the minister is indictable for the contempt of the order of this court.

BURTON v.
MATTON.

Murphey versus Balderston, January 22, 1740.

Case 106.

IF a person applies to this Court for an order of reference to a Master to tax a bill, upon an undertaking to pay; and the person who obtains the order dies; his representative shall not revive it, but upon the same terms, the undertaking to pay. *Vide 2 G. 2. c. 33. An act for the better regulation of attornies and solicitors.*

S. C. Barn. Cha. 265.
A representative of a person who had obtained an order to tax a bill, can revive it only on an undertaking to pay.

In the 23d section, relating to bills of costs, a solicitor must leave a copy of the execution of the order for taxation, and the Master's report of the sum at which the bill is taxed, at the defendant's house, or it will not bring him into contempt without such service, for the act of parliament does not alter the old method of proceeding in this respect.

Though several clerks in court were of opinion, that an attachment will go forthwith upon non-payment of a bill taxed under an order of chancery, by this act of parliament, yet I am of opinion that the defendant ought to be served, for it would be absurd to take him into custody, before he knows what the sum is, at which the bill is taxed (1).

To bring a defendant into contempt, on an order of taxation, you must leave a copy at his house, and the report of the sum at which the bill is taxed.

(1) This case is more fully stated in *Barn. Cha. 265. Reg. Lib. B. 1740. fol. 126.*

Elizabeth Wallis, an Infant — —

Plaintiff. Case 107.

Charles Hodson, and Elizabeth his Wife — —
Et c contra.

Defendants.

James v. Wallis
J. E. Howard 10

JAMES Wallis, an inhabitant of the province of York, died intestate in December 1724, and at his death left issue *Towners Wallis*, his only child, an infant, who died within a week after his father, and the defendant *Elizabeth* his widow *ensuint* with the plaintiff, who was born the 22d of May following.

S. C. Barn. Cha. 272.
J. W. died intestate 1724, and left issue *T. W.* who died within a week after his father, and his

wife *ensuint*, and on the 20th of May following the plaintiff was born; she is intitled to her share under the statute of Distributions, as much as if she had existed in his life-time.

The widow took out letters of administration of her husband's personal estate, and possessed herself thereof, and afterwards intermarried with *Charles Hodson*: the bill is therefore brought by *Elizabeth Wallis* against *Hodson* and his wife, praying an account of the personal estate of *James Wallis*, come to the hands of the defendants.

Hodson and his wife by their cross bill insist that *Elizabeth*, not having any jointure before her marriage, was by the custom of the province of York become intitled to one moiety of her late husband *James Wallis's* personal estate, and, under the statute of Distributions,

**WALLIS v.
HODSON.**

Distributions, to a third of the dead man's share; and that his son *Towers Wallis* was intitled to the other two thirds of the distributable moiety; and that he dying intestate within the province, and without wife or children, all his share of the personal estate, by virtue of the statute, came to the plaintiff *Elizabeth*, his mother; and that the defendant *Elizabeth Wallis*, not being born till after the death of *Towers Wallis* the son, was not born heir to her father, and by that means she could not by the custom of the province of *York* take any part of his personal estate, but was by such her heirship barred and excluded, and therefore pray that the whole personal estate might be decreed to the plaintiff *Elizabeth*, the wife of *Hodson*.

LORD CHANCELLOR,

James Wallis having been an inhabitant of the province of *York*, and dead intestate; his estate became deviseable into three equal parts; one third thereof belonging to his widow, or third to the son, and the last distributively according to the statute of 22 & 23 C. 2. c. 10.

[116]

The question therefore in these causes, can relate only to the third part distributable under the statute; and the dispute is as *Towers Wallis* the son's share of the distributable third, whether it shall go intirely to the mother *Elizabeth Hodson*, or in moiety between her and *Elizabeth Wallis* his sister.

It has been insisted on behalf of the defendants, that *Towers Wallis* dying without wife or children, his whole personal estate goes to his mother, as next of kin.

And on the other hand, the plaintiff in the original cause claims a moiety of her brother's personal estate, under the statute of 1 J. 2. c. 17. §. 7. the words of which are, "If after the death of a father, any of his children die intestate, without wife or children, in the life-time of the mother, every brother and sister, and the representatives of them, shall have an equal share with her, any thing in the last mentioned statute to the contrary notwithstanding."

To be sure, if the plaintiff, the sister, had been born before the death of the brother, out of controversy she would have been thus intitled.

But the doubt is, whether she is so intitled as she was a posthumous child? And I am of opinion it will make no material difference.

A parent's duty to provide for all his children will extend to posthumous ones.

It has been admitted that the debt of nature which the father owes, to provide for all his children, will extend to posthumous ones, for as it is an event which must happen within nine months, no inconvenience can arise from it: but then it is objected, that there is no such debt of nature as to collaterals, and brothers and sisters.

There is no determination under the statute of J. 2. that the half blood shall take equally with the whole,

It has been said, If I should determine in favour of the plaintiff *Elizabeth Wallis*, it would introduce this inconvenience, that a posthumous child of the half blood might hereafter be unable to take (1); but though it has been long settled, that

(1) So *Burnett v. Mann*, 1 Ves. 156.

ren of the half blood shall take equally with the whole, & the act of C. 2. commonly called the statute of Distribution, (*Vide Smith ver. Tracy*, in *B. R.* 1 *Vent.* 307. 316. 323. *Boover's Parl. Cas.* 108. and 2 *Mod.* 204. Yet I do not any determination as to this point, under the statute of 2. and therefore will leave this point unprejudiced till it arise.

WALKER v.
HODSON.

th regard to the difference that has been taken between collateral and lineal succession; to be sure the * principal and secondary intention of this statute of J. 2. was to preserve the share of the father to his own children in a reasonable degree, or to let the mother run away with too much to her children by the second husband.

The principal intention of the act of J. 2. is to prevent the mother's running away with too much to her children by a second husband.

ough it is in general settled, that the shares vest immediately upon the death of the intestate, and holds equally in collateral succession, (*Vide Palmer versus Alicot*, 3 *Mod.* *Judgeon versus Ramsden*, 2 *Vern.* 274.) yet notwithstanding, it has been determined, that there is an exception to this rule, in case of a posthumous child; for, in *Edwards versus Freeman* it is said, a distributive share does not, in all events, vest immediately on the intestate's death, because, if there be a posthumous child, such child shall be let in for its share, though not at the intestate's death. 2 *Wms.* 446.

That the shares vest on the death of the intestate, holds equally in lineal and collateral succession.

[*117]

The principal reason I go upon in the question is, that the child was *in ventre sa mere* at the time of her brother's death, consequently a person *in rerum natura*, so that both by the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's lifetime.

A child *in ventre sa mere*, is, *in rerum natura*, and is as much one, as if born in the father's lifetime.

As to the common law, there is the trite case of an *in ventre sa mere* being vouched in a common recovery; her also may justify the detaining of charters on behalf of a devise to him is good, by the opinion of *Treby* and *St. John*, in *Scatterwood and Edge*, 1 *Salk.* 229. a bill may be brought in his behalf, and this court will grant an injunction in order to stay waste, 2 *Vern.* 710. *Musgrave versus Parry*

This court will grant an injunction to stay waste, in favour of an infant *in ventre sa mere*.

Every body knows what gave rise to the statute of C. 2. of distributions, was the contention between the common law and ecclesiastical courts: see a very good account of this difference in *Palmer and Elliot*, 3 *Mod.* 58. *Carter versus Crowley*, 496.

The contention between the common law and ecclesiastical court, gave rise to the statute of Distributions.

The third and fifth section of the statute of Distributions show that the main scope of it was to make the jurisdiction of the ecclesiastical court more extensive, than is allowed by the common law.

The jurisdiction of the ecclesiastical court made more extensive by the statute.

See *Burdet v. Hopegood*, 1 *P. W.* 486. *Beale v. Beale*, *ibid.* 245. *Miller v. Miller*, 2 *Ves.* 85.

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HODSON.

The statute is to be construed by the rules of the civil law: the act of §. 2. is an act of continuance of the statute of C. 2.

[*118]

In 2 *Wms.* 441. Sir Joseph Jekyll states at large, in the case of *Edwards and Freeman*, the occasion of making the statute of Distributions; and I now take it to be fully settled, that this act is to be construed by the rules of the civil law, and the statute of *1 §. 2. I think ought to be construed in the same manner; which is an act of continuance of the statute of C. 2. with three additional clauses, and is to be considered as if the statute of C. 2. had been re-enacted, and repeated with these clauses.

Secondly, As to the civil law, nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit. *Swinbourn new edit.* 250 & 251. *Digest*, lib. 1. tit. 5. l. 7. *Justin. Inst.* lib. 2. tit. 13. *de exheredatione liberorum*, l. 1. *sect.* 1. lib. 5. tit. 2. *de inefficis testamento.* L. 6.

It may possibly be said, that these rules are only laid down with regard to lineals, but you will find it there equally with regard to collaterals. *Digest*, lib. 32. tit. *de Legatis et fidei commissis*, l. 9. *Digest*, lib. 37. tit. 9. *De ventre in possessionem mittendo*, l. 1. §. 1. 2. Lib. 38. tit. 8. *Unde cognati*, l. 1. §. 8.

The civil law makes a difference between a child *in ventre sa mere* in esse, at the father's death, and only conceived.

The last passage in the *Digest* is more explicit than any other; but then it makes a difference between a child *in ventre sa mere in esse* at the father's death, and only conceived, the latter is not considered as having any relation to the intestate, being, according to a term made use of there, not *animax*.

By the *Roman* law, the having a great many children of one's own, excused from the guardianship of others; but a child unborn was never reputed to excuse a father from being a guardian, nor amongst the number of the *trium liberorum*; but this no way relates to the present case, for no question can arise here, but what makes for the benefit of the posthumous child, and therefore I decree, after payment of the debts and funeral expences of *James Wallis*, the intestate, that the clear surplus of the personal estate be divided into nine equal parts, according to the custom of the province of *York*, and the statute for distribution of intestates' estates, and that four ninths thereof be considered as the share of *Elizabeth Hodson*, and be paid or retained by *Charles Hodson* and his wife; and that four other ninths thereof be considered as the share of *Elizabeth Wallis*, and allotted to her; and that the remaining ninth part thereof be considered as the distributive share of the dead man's part, belonging to *Towers Wallis*, deceased; and order this ninth should be divided into moieties, one moiety thereof to be paid to, or retained by *Hodson* and his wife; and the other moiety thereof to the infant, *Elizabeth Wallis* (1).

*Adm. v. Arnold.
2 De 44. M. 74. 12.*

Vernon versus Vawdry, January 24, 1740.

Cafe 108.

AN original bill, and an amended bill, are as one, and the records are always fixed together; but where the amendments are so large as they cannot be added, then there is a new engrossment, and the parties ought to be mentioned over again, and to be served with notice of it.

S. C. Barn. Cha. Rep. 280. plenius.

Where amendments are so large as they cannot be added, there a new engrossment and a new service on the parties is necessary.

there a new engrossment and a new service on the parties is necessary.

A breach of trust is considered but as a simple contract debt, and can only fall upon the personal estate of a trustee, and the particular circumstances of a case ought not to vary the rule (1).

Breach of trust can fall only on the personal estate of a trustee.

If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify; but if it is apparent to the Court, that there has been fraud and imposition, the decree must be, that the whole shall be opened, notwithstanding it was a stated account of 23 years standing; and Mr. *Richard Vernon*, who was guilty of the fraud, is dead likewise (2).

Where fraud appeared in a stated account, the whole decreed to be opened, tho' of 23 years standing.

(1) *Cox v. Bateman*, 2 Vef. 19. *Bartlett v. Hodgeson*, 1 Durn. & East 42.

(2) See ante 113, and *Dawson v. Dawson*, 1 vol. 1. note 1.

Barker versus Dumaresque, January 29, 1740.

Cafe 109.

THE plaintiff brought his bill for a discovery of assets, and relief against the defendant, as administrator.

Barnard Chanc. Rep. 277. S. C.

The defendant, to give preference to other creditors, confesses judgments.

Where the representative of an intestate is

seeking to give preference, by confessing judgments, the court will give the plaintiff leave to proceed at law to recover judgment with a *cesset executio*, and in this court, for a discovery and account of assets.

The plaintiff thereupon brought an action at law for the same demand he sued for in equity.

The defendant obtained the usual order, that the plaintiff might make his election, whether he would proceed at law.

The plaintiff now moves to discharge the order of election.

LORD CHANCELLOR,

The plaintiff shall not proceed in this court and at law at the same time, for the same demand against executors or administrators in ordinary cases: but the representative of the intestate seeking to give a preference to others by confessing judgments, distinguishes this case from the ordinary rule, and therefore I will give the plaintiff leave to make a special election, viz. to proceed at law to recover judgment with a stay of execution, and likewise to proceed in this court for a discovery and an account of assets (1).

[120]

(1) *Reg. Lib. A. 1740. fol. 193.*

Case 110.

*Fell versus Lutwidge, February 3, 1740.*S. C. Barn. Cha.
129.

Though an administration is not taken out, till after the filing of the bill, yet, if procured before a cause comes to a hearing, in equity it is sufficient, otherwise at law, because there the defendant may crave *oyer* of the letters of administration.

IT is charged by the bill, that the plaintiff is the representative of the late Mr. *Fell*, and has taken out administration, and by that means intitled to a demand against the defendant; neither the title he sets up objected to, nor the administration denied by the defendant's answer, and therefore though the administration was not actually taken out till some time after the filing of the bill, yet, as the plaintiff has procured it, before the cause comes to a hearing, in equity it is very sufficient, though not good at law, because there the defendant may crave *oyer* of the letters of administration; but thing is more frequent in this court, than where a plaintiff has a right to a distributory share, and the administrator is not a party to the suit, to order him to be brought before the Master, and the bill is never dismissed in such a case for want of his being a party.

Case 111.

French versus Baron, the same Day (1).

The Court cannot declare a will well proved, where an heir at law is not to be found.

With Jurine
N. S. Keen. 277

A Bill brought by a residuary legatee, for sale of a real estate pursuant to the will of *Arthur Squire*, and that the residue after payment of debts, may be paid to the plaintiff.

The bill suggested that no heir at law could be found, which was admitted by the defendant's answer.

LORD CHANCELLOR,

Let there be a sale of the real estate, but I cannot declare it well proved, there being no heir at law (2).

The Court will not allow a mortgagee more than his principal and interest, notwithstanding the mortgagor has agreed, he shall be paid for his trouble of receiving the rents.

Though there is a private agreement between a mortgagee and the mortgagor, for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate, yet the Court will not carry it into execution, for they will not allow him any more than his principal and interest (3).

(1) The points here reported do not appear in the Register's book. *Reg. Lib.* A. 1740. fol. 300.

(2) *Vide* in *Colton v. Wilson*, 3 P. W. 190.

(3) *Vide Bonithon v. Hackmore*, 1 P. W. 316. *Godfrey v. Watson*, *post*. 3518.

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Harrison versus Harrison, February 7, 1740.

Case 112.

WHERE a trustee of stock or annuities takes upon him to transfer, it is a breach of trust, and the *rescissus que transferitur* by this court will be intitled to an election, either to have the principal stock or annuities restored to him, which stood in

name of the trustee, or else to have the money it produced, when it was sold by the trustee (1). HARRISON v. HARRISON.

(1) See *Bosack v. Blakewy*, 2 Bro. post. 159. *Earl Powlet v. Herbert*, Ves. Cha. Rep. 653. *Waite v. Wberwood*, jun. 297.

Glass versus Owenham, February 10, 1740.

Case 113.

A Father by his will appoints an executor *durante minore* S. C. Barn. Cha. 332.
etate of his daughter, and that she should be the execu-
trix when she comes of age; the daughter, turned of 21,
brought alone before the court, though it appears in the cause
that the executor *durante minore etate* had collected in the greatest
part of the personal estate: the counsel for the plaintiff insist it
is sufficient to have the daughter, because, being of full age, she
is complet executrix *ab initio*, and had the whole right of repre-
sentation in her.

Though the person is come of age, during whole infancy, the will appointed an executor *durante minore etate*, yet if he has not collected in the whole
estate, he must be brought before the Court.

LORD CHANCELLOR,

This bill is brought by the representative of the testator's widow, for the sum of 3000*l.* charged upon the whole real and personal estate of the testator, for her benefit, and therefore you must have the representative of the whole personal estate, that is the executor *durante minore etate*, and for want of him the cause must stand over.

If the daughter had received all the testator's personal estate from the hands of the executor *minore etate*, upon an account between them, the objection for want of parties had been overruled.

Williams

William

9 - Mode

Tetherby. v.

Pate. 3d

Phelps. v. P.

h. Simon

Holland. v. P.

L. C. Feb. 5. 18

Heathe versus Heathe, February 11, 1740 (1).

Case 114.

WILLIAM Madgewicke, esq; being seised in fee of the manor of Gayton, made his will, dated March 7, 1721, and devised the said premises unto Averilla his wife, for her life, and, after her death, to his cousin, William Madgewicke, his heirs and assigns for ever, upon condition that he should pay, and that the premises should stand charged with the payment of 400*l.* within six months after the death of Averilla, among all the children of his sister, Catherine Heathe, share and share alike.

In April 1722, the testator died, and Averilla made her will, being seised in fee of several copyhold messuages and divers freeholds, and gave her said lands and messuages in trust by sale or mortgage, to pay all her said husband's debts, and gives all the residue of the money arising by such sale of the lands and premises, copyhold or freehold, and all her personal estate, among

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(1) Reg. Lib. A. 1740. fol. 282.

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HEATH.

all the children respectively, male or female, of her brother *Heath*.

Some years after the testator and testatrix's death, a daughter of *Catherine Heath* was born.

One of the daughters (living at the time of making it and at the several deaths of the testator and testatrix) died, to whom her father administered.

The first question was, Whether the after-born child have any share under either of the wills?

The second question was, Whether the father of the daughter shall have a share under the will of *Averilla*, or whether her share survives? *Vide* the case of *Greave* versus *Bo*

(a) Ante 1 vol.
509.

Share and share alike has been held these 200 years to be a tenancy in common (1).

Mr. Justice Parker. A question that was made upon this will, whether the words share and share alike make a tenancy common or a joint-tenancy, is given up, and very rightly has been held these 200 years to be a tenancy in common.

The words of the second will are not quite so clear, as are pretty clear too.

"To and amongst all the children respectively, male or female, of her brother and sister *Heath*."

Lord Chief Justice Holt leaned strongly to a joint-tenancy, but courts of equity are far from favouring it.

I should think the word *respectively* would separate the and make a tenancy in common; for notwithstanding my Lord Chief Justice *Holt* leans so strongly to joint-tenancy, yet courts of equity are very far from favouring it so much.

The principal question is as to the after-born child.

A devise can never relate to a child who was not *in esse*, till some years after testator's death.

For my part I have no notion that this devise can have relation to a child not *in esse* till some years after the testator and testatrix's death; it may as well be intended twenty years afterwards, if a woman is capable of bearing so long, and make great confusion by unravelling accounts that have settled so long before (2).

(1) See *Prince v. Heylin*, ante 1 vol. 493.

(2) The general rule in cases of this nature seems to be, that where the devise or gift to the children is *general*, and not limited to a particular period, then it is confined to the death of the testator. *Nortley v. Burbage*, *Prec. Cha.* 470. *Heath v. Heath*, *supra*. *Husley v. Chalmers*, 2 *Ves.* 83. *Isaac v. Isaac*, *Amb.* 348. 1 *Bro. Cha. Rep.* 532. *S. C.* cited. *Viner v. Francis*, 2 *Bro. Cha. Rep.* 658. *Hughes v. Hughes*, 3 *Bro. Cha. Rep.* 352. 434. *Hill v. Chapman*, *ibid.* 391. But where such devise or gift is to one for life, or where the distribution is postponed to a future time, then children born during the life or before that time, are let in. *Harding v. Glynn*, ante, 1 vol.

470. *Graves v. Boyle*, ante 1 vol. *Haughton v. Harrison*, *post.* 329. *v. Airey*, 1 *Ves.* 111. *Attorney v. Crispin*, 1 *Bro. Cha. Rep.* 386. *Greave v. Congreve*, 1 *Bro. Cha. Rep.* *Devisme v. Mello*, *ibid.* 537. *B v. Karver*, *Coop.* 309. *Anders Partington*, 3 *Bro. Cha. Rep.* 401. *ford v. Hunter*, 3 *Bro. Cha. Rep.* It seems that under a devise to a child living at the testator's death, a child *entre sa mere* shall take. *Hale v. Prec. Cha.* 50. *Beale v. Beale*, 1 245. *Millar v. Turner*, 1 *V. Clarke v. Blake*, 2 *Bro. Cha. Rep.* *Sed contra* *Pierjon v. Garnett*, 2 *Bro. Rep.* 38. *Cooper v. Forbes*, 2 *Bro. Rep.* 63.

As to the point of the father's taking the share of the deceased daughter as her administrator, I am clear of opinion that he was intitled, and that it shall not survive to the brothers and sisters, for it vested in the deceased as her separate and independent share, being a tenancy in common, and not a joint-tenancy, according to the aforementioned construction of the word *respectively* (1).

HEATHE V.
HEATHE.
The word *respectively* will separate an estate, and make it a tenancy in common.

(1) Vide *Sheppard v. Gibbons*, *post*. 441. 444.

The last seal in *Hilary Term*, February 12, 1740.

Case 115.

A Motion on behalf of a defendant in a cause, that the plaintiff should not be allowed to amend his bill on payment of twenty shillings costs only by virtue of the last order which he got from this court; but upon costs to be taxed by a master, the Chancellor would have granted the motion, as this was the third order of amendment, if it had not appeared in this case that the last order which the plaintiff obtained had been upon terms, and with the express consent of the defendant.

After a third order of amendment, a defendant will be allowed costs to be taxed.

Watts v. Mason
1 N. 2. 112

Weldon versus Fell, February 17, 1740, before Mr. Justice Parker, at the Rolls, now Lord Chief Baron. Case 116.

SAMUEL Parker, by his will dated the 30th of September, 1717, "gave the sum of 3000*l.* to his father-in-law John *Fell*, and to Elizabeth Parker his wife, upon and in trust to put the same out to interest or otherways upon some purchase, as my said trustees and the survivor of them shall think fit, and then to permit my said wife to receive all interest, benefit and profit as shall accrue, arise from, or become due for the same, to her own use during her natural life, and after her decease, to divide the whole principal with all interest and profits among my four children, share and share alike, and the survivors of them, but not before they shall have respectively attained the age of one and twenty years, or days of marriage, which shall first happen; for my mind and intent is, that if any of my four children shall die before they attain their age of twenty-one or days of marriage, that his, her, or their share so dying, shall go and be equally divided among the survivors of them."

Samuel Parker by will gives 3000*l.* to trustees to be placed out at interest or on a purchase, and then to permit his wife to receive the interest during her natural life, and after her decease to divide the whole principal with all interest among his four children share and share alike, and the survivors of them, but not before they attain 21, or day of marriage.

Constance the plaintiff's wife, who was one of the four children, attained 21, but died in the lifetime of the mother, so that the division of the 3000*l.* could not be made till after her death; the trustees laid out the greatest part of the money in the purchase of freehold and copyhold, and lent another part on bond. Mr. Justice Parker held this was a vested interest in CONSTANCE, and that survivors meant such as should be living at the death of the child before 21, and not such as were living at the death of the mother: and that the representative of Constance is intitled to a fourth of the bond, and a fourth on the whole in government securities, and which has not been invested in land.

Constance the wife of the plaintiff, and one of the four children of Samuel Parker, attained her age of 21, and died in 1737, in the life-time of her mother, so that the division of the 3000*l.* could not be made till after her death.

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WEEDON v.
FELL.

The first question was, Whether an interest vested in *Constance* the wife of the plaintiff and transmissible to him as her representative, or whether it is to be considered as a contingent interest during the life of the mother, and not transmissible the representative of *Constance* till after the mother's death.

The trustees after the death of the testator laid out the great part of the 3000*l.* in the purchase of freehold and copyhold lands in *Stepney* and *Ratcliffe* in *Middlesex*, to the use of the trustees, their heirs and assigns for ever; but by divers declarations of trust declared the purchases were made for the use under *Samuel Parker's* will, concerning the 3000*l.* the residue was lent to *John Robinson* on bond.

The second question was, What the nature of the power that the trustees have under this will, whether they are bare trustees, or whether they could alter the nature of the property, and by vesting it in land make it cease to be money, and go to the heir at law instead of being divided in equal shares among the children.

Mr. Justice Parker. As to the first question, it seems to me very clear that this is an interest vested in *Constance* at her age of 21, and the words *survivors of them* in the latter clause plainly mean such survivors as should be living at the death of the child before 21, and not such as were living at the death of the mother; and as the contingency therefore has not happened, it certainly vested in *Constance*, and will go to the plaintiff as her representative (1).

The words upon which the point in the second question arises are equally clear, as to giving a power to them to lay out the 3000*l.* in the purchase of lands (2), and it would have been improper if they had bought only a term for years, as it is a beneficial property.

I do agree that it must be taken according to the natural meaning and intention of the testator at the time of his death (3) and no alteration in circumstances afterwards can empower trustees to vary that intention; but I am clear in this case that the trustees have pursued and not acted contrary to their power.

I see no difference between money left absolutely to the person himself or to another in trust for him; it equally vests in the *cestui que trust* when the contingency happens upon which it became payable.

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The civil law has made a distinction where a legacy is charged upon land, and where it is to be paid out of a personalty; the former if expressly said to be payable at 21, and would vest though the legatee died before that age, if issuing out of personal estate (4), yet in favour of land it shall sink into the land, unless the legatee actually arrives at 21 (5).

I do not know what grounds this law goes upon in making this distinction between a legacy vested, when charged upon

(1) *Heurtley v. Mason*, Amb. 621.

(2) *So Earlom v. Saunders*, Amb. 241.

(3) *Vide Combe v. Combe*, post. 185.

(4) *Scadman v. Palling*, post. 3 vol. 427.

(5) *Prowse v. Abingdon*, ante 1 v.

482. *Cox's note to Chandos v. Tall*

2 P. W. 612. *Har. Co. Litt.* 237.

note 1.

personal, and when charged upon real estate, but it is a settled distinction now, and therefore cannot be dispensed with in any particular case, so as to let in the representative of *Constance* to a fourth of the value of lands purchased by the trustees.

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FELL.

Mr. Justice Parker declared that the plaintiff is intitled to the sum of 37*l.* 10*s.* as her share of the 150*l.* not placed out in land, together with interest for the same from the time of the death of *Elizabeth Parker* the mother; and ordered and decreed that the defendant *John Fell* the elder, and *John Fell* the younger, do pay the same to the plaintiff accordingly. And it was further ordered that the plaintiff's bill as to all the other relief sought thereby, do stand dismissed out of court (1).

(1) *Reg. Lib. B. 1740. fol. 158.*

Warren versus Stawell, at the Rolls, February 17, 1740, before Mr. Justice Parker. Case 117.

AN objection was made for want of parties upon the act of parliament of 3 *W. & M. c. 13*, against fraudulent devisees, that the heir at law must be before the court.

A creditor brings a bill under the statute of fraudulent devisees against the

assignee of the devise only, the heir at law is a necessary party, and for want of him the cause ordered to stand over (1).

In answer to the objection it was insisted, that where the creditor comes against the assignee of devisee it is not necessary.

Mr. Justice Parker said, The objection must be allowed: it is admitted on all hands that if an action at law is brought, it must be both against the devisee and heir at law, and equity follows the law in this respect; but besides, this is not an assignee of the devisee, but an assignee of bankrupts only who stands in the place of the devisee, and represents him, so that he can by no means be called an assignee.

If an action at law is brought, it must be both against the devisee and heir at law, and equity follows the law in this respect.

(1) *Gawker v. Wade*, 1 *P. W.* 99.

Hide versus Haywood, the same day, before Mr. Justice Parker.

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Case 118.

A Testator in this case directed that his executors, for any expences they shall be at, shall be allowed their costs out of his estate; and therefore, if there had been only an error in judgment, I should have been of opinion that they should not have paid costs, nay even if there had been no provision for it in the will (1); but where there is a plain fraud in executors, as there was in this case, (for though 150*l.* was offered for the good-will of a house, part of the testator's estate, the executors refused the person unless he would promise to employ

Notwithstanding a testator directed that his executors, for any expences they shall be put to, shall be allowed their costs out of his estate; yet as there was a plain fraud in this case in the executor, the Court decreed costs against them.

(1) *Humphrey v. Moore*, ante 108.

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HAYWOOD.

them in the way of their trade as wine merchants), I will decree costs against them; for this is a diminishing of the estate and notwithstanding the testator's direction that their cost should come out of the estate, he could never mean to save them harmless where they have been guilty of a fraud (1).

(1) *Reg. Lib. A.* 1740. fol. 274. *Vide Wilkins v. Hunt*, *post.* 151.

Case 119. *Hatbornthwaite* versus *Ruffel*, first seal after *Hilary Term* February 18, 1740.

S. C. Barn. Cha.
Rep. 334.

It is no ingredient to take the assets out of the hands of an executor, that he is not of an affluent fortune, as long as the testator himself has placed this confidence in him without regarding his circumstances.

A Motion for a receiver to be appointed by this court to collect in the money standing out upon several securities and the rest of the assets of a testator, on a suggestion that the will was obtained by fraud, and that the sanity of the testator is now likewise contesting in the ecclesiastical court (1); affidavits too on the part of the motion were produced to shew the mean circumstances of the two executors, and the counsel relied much upon the case of *Powis* versus *Andrews* (2), where upon a like motion a receiver was appointed.

Lord Chancellor denied the motion, and distinguished it from the case of *Powis* and *Andrews*; there the fraud appeared very strong, the executors too were not related to the testator, took out a probate the very morning he died, and that very afternoon wasted and imbeziled large sums of money which they got into their hands.

But here it is widely different; there are very strong affidavits produced on the part of the defendants to prove the sanity of the testator, and no circumstances to shew that the executors used any unjust means, or prevailed upon the weakness of the testator, to make his will in their favour; besides, upon the very face of it, it is a rational will, for he gives away his estate in legacies to seven of his nearest relations, and has preferred the executors, who are as near of kin to him as the plaintiff himself, by making them residuary legatees.

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Nor are there any grounds to grant this motion upon the other suggestions of the executors not being responsible from their indigent circumstances; the court never esteems this a any ingredient to take the assets out of the hands and care of the executors, nor will even the ecclesiastical court refuse persons a probate because they are not of affluent fortunes, as long as the testator himself has placed this confidence in them without regarding their circumstances; besides too, this case is materially different from *Powis* and *Andrews* in another respect; there is no probate here, so that as the bulk of the testator

(1) See *Montgomery v. Clark*, *post.* 378. *v. Powell*, 1 *Ves* 290: *Morgan v. Harris*.

(2) 2 *Bro. Par. Ca.* 476. S. C. See 2 *Bro. Cha. Rep.* 121. *Breun v. Duns* also *Taylor v. Allen*, *post.* 213. *Barnesley bridge*, *ibid.* 321.

tator's estate is placed out upon securities, the executors are not intitled to sue or bring any actions for them; this application too is not till a year after the commencement of the suit in the ecclesiastical court; for these reasons his lordship denied the motion.

HATHORNTON
WAITE v.
RUSSELL.

Lowther versus Condon, February 9, 1740.

Case 120.

THOMAS Condon made his will, wherein were these words :

S. C. cited : Vol.
45.
Barnard. Chanc.
327. S. C.

Imprimis, " I give and bequeath unto my daughters *Isabella*
" *Condon* and *Diana Condon* the sum of 500*l.* a-piece, to be
" raised and paid unto them and each of them immediately
" after my death out of the rents, issues, and profits of my
" lands and tenements in *Wold Newton Ballerwicke* and *Bog-*
" *thorpe* in the county of *York*, or by sale or mortgage of the
" same, or a competent part thereof, together with interest
" for the said respective sums after the rate of 6*l.* per cent.
" ann. from the time of my decease until the several respective
" sums of 500*l.* shall be duly paid to my said daughters, or
" their respective executors, administrators or assigns."

Murkin v.
Phillips
W. & H. L.

" *Item*, I give and bequeath unto each of my said daugh-
" ters, the sum of 1000*l.* to be raised and to be paid unto
" them severally and respectively immediately after the de-
" cease of my wife, out of the rents, issues and profits of my
" manors, lands, tenements and hereditaments in *Willoughby*
" in the said county of *York*, or by sale or mortgage of the
" same, or a competent part thereof, together with interest for
" the said several sums of 1000*l.* after the rate aforesaid,
" from the decease of my said wife, until the said sums shall
" be duly paid to my said daughters, or their respective execu-
" tors, administrators or assigns; and my further will is, that
" in case either of my said daughters shall depart this life be-
" fore me, then the survivor of my said daughters, her exe-
" cutors, administrators and assigns, shall have and receive all
" and every the sum and sums of money herein by me before
" devised out of my said lands, to be raised in the manner
" herein before appointed; and in such case the part of the
" daughter so dying shall not cease or sink into the estate for the be-
" nefit of my heir, but shall remain and be raised for the benefit of
" my surviving daughter."

Pool v. Ser.
Simon v.
Watkins

Lastly, " I bequeath all my chattels real and personal, and
" all my goods moveable and immoveable, and all my per-
" sonal estate whatsoever, unto my said daughters, and do
" make and constitute them executors of this my last will and
" testament. In witness, &c."

Cheek v.
2 S. C. 179
Salisbury v. Pitt
3 Mar 86
Hailey
Fitzgerald
J. Dury

The testator died, and left one son *Thomas*, and two daugh-
ters *Diana* and *Isabella*; in 1719, after the death of the testa-
tor, *Diana* intermarried with Sir *William Lowther*; *Diana* died
in 1736; *Anne* the mother died in the year following: the
present bill is brought by Sir *William Lowther* against *Tho-*
mas

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CONDON.**

mas Condon and Isabella, who has intermarried with I in order to have the sum of one thousand pounds n in the will raised out of the estate, which was thereby with it.

Lord Chancellor said his opinion was that the 1000 to be raised: he owned it was very true, that there is blished and fixed distinction between legacies charged personal estate, and legacies upon the real (1); and the would have been clearly a vested legacy in case it is chargeable upon the personal, yet it is not so clear a is chargeable upon the real estate; but still there is ground to say, even in the present case, the legacy is one, and the plaintiff intitled to it.

The words of the will are in this manner: "I give
"queath to each of my daughters the sum of 1000
"raised and to be paid unto them severally and rel
"immediately after the decease of my wife."

It has been de-
termined, where
a legacy upon
land depends on
two contingen-
cies, though one
of them doth not
happen, the le-
gacy shall be
raised.

Where the post-
poning the time
of payment of a
legacy has been
owing to the
circumstance of
the testator's
estate, and not
to the circum-
stances of the
legatees, that is
not so strong a
case for a lega-
cy's sinking into
the estate, as
where the post-
poning the pay-
ment of it has
appeared to have
arisen from cir-
cumstances on
the part of the
legatee.

An inference
may be drawn in
the plaintiff's favour from the direction that the legacy shall be paid to the daughters, or the
executors, administrators, and assigns.

So that it is a gift immediate to the daughters, tho indeed to be raised till after the death of the testator's v time mentioned in the will is not annexed to the sub the legacy, but to the payment of it; and consequ this had been a legacy chargeable upon the personal would have been clearly a vested one, and the plaintiff to it; but this is chargeable upon the real; it must b that it is equally an established rule, that where a given of this sort, though the time mentioned in the annexed to the payment of it, and not to the body stance of the legacy, yet in general such legacies sha raised, where the legatee dies before the time of paym this is so more especially where a legacy of that fort by way of portion: but notwithstanding this is the gen yet the principal ingredient which has given rise to t trine has been, that the postponing the payment of t has appeared to have arisen from circumstances on the the legatee, as her attaining the age of 21 or marriage: the legatee had died before the time of payment of th this court, which favours the real estate, have confide this light, that there is no occasion it should be raised, ty dying, who was in the immediate contemplation of tor; but where the postponing the time of payment of has been owing to the *circumstance* of the testator's g not to the *circumstances* of the legatee (2), that is not so

(1) See Mr. Cox's note to *The Duke of Chandos v. Talbot*, 612.

(2) This principle has been acknow-
ledged by the following cases. *Rutler v. Duncombe*, 1 P. W. 457. *Pitfield's case*, 2 P. W. 513. *Hutchins v. Foy*, Cam. Rep. 716. *Emes v. Hancock*, post. 507.

Sherman v. Collins, post. 3.
Hodgson v. Rawson, 1 Ves. 44.
Tickener, Amb. 703. 1 Bro. C.
120. S. C. *Tunstall v. Brack*
167. 1 Bro. Cha. Rep. 12.
Dawson v. Killet, 1 Bro. Cha. 1.
Clarke v. Rofs, 1 Bro. Cha. 1.

case to favour the legacy's sinking into the estate, as the other is; though his Lordship said he did not know but that the cases have gone so far as even there in some instances to allow of their sinking into the estate: it has been determined that where a legacy charged upon land depends upon two contingencies, and one of them doth not happen, the legacy shall be raised; the case of *King and Withers*, *Prec. in Ch.* 348. However, in the present case it is clear upon the penning of the bill that the intention of the testator was, that the legacy in question should be raised in favour of the plaintiff; here 1000*l.* is given to each of the daughters, with interest to be computed from the death of the testator's wife; no argument can be drawn from the circumstances relating to the interest, for it was natural to give a direction about that in the manner it has been done; but then the will goes on and directs *that this legacy shall be paid to the daughters, or to their respective executors, administrators and assigns*: and something may be inferred from thence in favour of the plaintiff.

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CONDON.

It has been said, that the use of this clause might be only to shew the testator's intention that if the daughters survived the mother, and afterwards died, the legacies should be paid to their representatives; but if that was the meaning of the testator, the inserting this clause was very unnecessary; for if the daughters survived the mother, there could be no doubt but that the representatives of them would be intitled to the legacy of course.

The use of this clause seems rather to shew the testator's intention, that if the daughters died in the life-time of their mother, and after the testator's death, that the legacies should be paid to their representatives. But his Lordship said he did not rest his opinion upon this clause in the will; the clause that he founded himself principally upon, was the following: and my further will is, "that in case either of my said daughters shall depart this life before me, then the survivor of my said daughters, her executors, administrators and assigns, shall have and receive all and every the sum and sums of money herein before by me devised out of my said lands, to be raised in the manner herein before appointed; and in such case the part of the daughter so dying shall not cease, or sink into the estate for the benefit of my heir, but shall remain and be raised for the benefit of my daughters."

The clause on which Lord Hardwicke principally founded his opinion was, the direction that if one daughter died before him her part should not sink into the estate.

It has been said, that the contingency upon which this clause of the will was to take effect has not happened; but it is plain that the testator had in his view a certain case wherein the legacy should not sink into the estate: *that case was*, the event of either of the daughters dying in the life-time of the testator. And if even in that case the testator designed that the legacy should not sink into the estate, a much stronger reason is there

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Note. *Kemp v. Dry*, 1 *Bro. Cha. Rep.* *Morgan v. Gardiner*, *ibid.* 193. *Dodson v. Hay*, 3 *Bro. Cha. Rep.* 404. *Smith v. Cha. Rep.* 191. *Pawsey v. Edgar*, *ibid.* *Partridge*, *Amb.* 266.
192. *Thompson v. Dew*, *ibid.* 193.

LOWTHER v. CONDON. to infer, that he did not design it should when the daughter survived him.

This clause is a plain indication of the testator's design, that the daughters should have this legacy at all events, and that it should not depend upon the accident of their dying in the life time of their mother: it has been said, that if the testator had been asked at the time of making his will, whether in such an event as has happened he would have the 1000*l.* legacy raised for the plaintiff, he certainly would have answered that he would not.

But such manner of arguing by asking a question of this sort is a very uncertain one: those that make the question, answer it themselves, and give such an answer as seems for their purpose.

But if this question had in reality been asked the testator, his Lordship said, he should have thought it much more probable, that, under the circumstances of the present case, the testator would have answered that his meaning was, that the plaintiff should have this legacy.

The plaintiff married this lady in 1719, she did not die till 1736, and it would be a reasonable thing in itself that, under such circumstances the testator should intend that the plaintiff should have this legacy; and *Lord Chancellor* decreed the 1000*l.* should be raised for the plaintiffs out of the estate charged with it (1).

(1) *Reg. Lib. B.* 1740. fol. 150.

Lowther versus Condon, June 6, 1741.

THIS cause was brought on again by the defendant on a petition of re-hearing, when the Attorney General of counsel for him cited the following cases: *Pawlet versus Pawlet*, 2 *Vent.* 366, 367. on a settlement. *Hall versus Terry*, (see my 1st vol. of *Rep.* 502.) *M. T.* 1738, before Lord *Hardwicke*. *Bradley versus Powell*, before Lord *Talbot*, May 1736, on a settlement. *Butler versus Duncomb*, 2 *Vern.* 760. *Brown versus Berkley*, *M. T.* 1728. *Duke of Chandos versus Talbot*, 2 *Will.* 609. *Proweles versus Abingdon*, 1738. (see my 1st vol. of *Rep.* 482.)

The cases cited for the plaintiff were *King versus Withers*, *Prec. in Chan.* 348. *Eq. Ca. Abr.* 112. *Bruin versus Bruin*, 2 *Vern.* 439, *Pitfield's case*. 2 *Will.* 513. *Wilson versus Spencer*, before Lord *King*, assisted by Sir *Joseph Jekyll*, 1732. *Atkins versus Hiccock*, July 1737, (see my 1st vol. of *Rep.* 500.) *Carter versus Bleisfe*, 2 *Vern.* 616.

The case of *Bradley versus Powell* (1), being much relied upon by the defendant's counsel, was stated more fully, and is as follows:

(1) *Ca. Temp. Talb.* 193. *S. C.* In *Hardwicke* expresses his disapprobation of this the case of *Tunfiall v. Bracken*, *Amb.* 167. case of *Bradley v. Powell*.
1 *Bro. Cha. Rep.* 124. *S. C.* Lord *Hard-*

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John Powell tenant for life, remainder to *Henry* his eldest son in tail, by recovery, &c. settled the estate to the use of *John* the father for life, as to part, remainder to trustees for 200 years, upon trust to raise 1100 *l.* for *Richard* the second son, to be paid him within six years after the death of *John*, or as soon after as the same could be raised, and in the mean time interest from the death of *John* the father, for and towards his maintenance, remainder to *Henry* the eldest son, for life, remainder to his first and other sons in tail.

Richard the second son attained his age of 45, and died in the life of his father, greatly in debt, and left no assets; two years after *John* the father died, and upon his death 700 *l.* per ann. came to *Henry*, and after his death to his son the defendant.

A bill was brought by the creditors of *Richard* to have the 1100 *l.* raised.

Lord Talbot declared *Richard* is to be considered as a purchaser under the recovery, and settlement of the 1100 *l.* but however said he, this case differs from *King* versus *Withers* and *Brown* versus *Berkley*, for there, marriage, one of the contingencies happened, but here the 1100 *l.* is limited to be paid to *Richard* within six years after his father's death, without any other limitation, and he dying in his father's life-time, the contingency hath never happened, and the portion must therefore sink for the benefit of the owner of the real estate; and so dismissed the bill. *Vide Cas. in Eq. in Lord Talbot's Time* 117.

LORD CHANCELLOR.

The present case seems to me to be brought on again rather for learning sake, and to refresh the memory of the court, than for any real service to the defendant; for my own part I had no doubt at the first hearing, and I think there is as little room for it here as in any case whatever.

Lord Hardwicke said he had no doubt at the first hearing, and thought there was as little doubt for it here as in any case.

As to the general rule, with regard to portions to be raised out of land, it has certainly been established ever since *Pawlet* versus *Pawlet*, that where there is a portion to be raised out of land, if the person dies before the day of payment comes, it sinks for the benefit of the heir, and determined on this reasoning, that the child did not want the portion, and therefore should not burden the inheritance (1).

Ever since the case of *Pawlet* versus *Pawlet* it has been the rule, that where there is a portion to be raised out of land, if the person dies before the day of payment comes, it sinks for the benefit of the heir.

There are several subsequent cases where there have been determinations against some of the distinctions in *Pawlet* v. *Pawlet*; as for instance, there may be a reasonable distinction made between a time of payment that appears to have been derived from the circumstances of the person, and where it has been derived from the circumstances of the fund; and this is the strong reasoning *Lord Harcourt* introduces in his argument on the case of *King* versus *Withers*.

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A reasonable distinction may be made from that case between a time of payment that appears to have been derived from the cir-

cumstances of the person, and from the circumstances of the fund.

(1) See *Prosser* v. *Abingdon*, ante 1 vol. 482. and the cases cited in note there.

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As cases of this sort must be left to the discretion of court, who are governed by prudential reasons and part circumstances, it is not to be wondered at that there should be one certain and invariable rule.

The father here has postponed the raising of the £1000 l. a-piece to his daughters till after his wife's decease for this reason, because it did not suit the circumstances of estate that it should be raised before (1).

The intention of the testator is shewn most strongly in clause, where he gives the whole to the surviving daughter. the clause in the first part of this case.

It is probable there may be some common lawyers who do not know if a portion is charged on land that it will sink in the inheritance, if the person dies before time of payment.

The testator might know that if the legatee died in his time it would lapse, but he might not know the rule of this in another respect; and I believe there may be several common lawyers who do not attend here, that possibly may not know that if it is charged on land, it will sink in the inheritance if person dies before the time of payment.

It is a most absurd supposition, that if both daughters should die in the mother's life-time, tho' they had lived to be years old, that the portions should not be raised, and yet one only survived the father, that daughter should have whole.

In short, the manner in which this clause is worded, shews the intention of the testator extremely plain, and as there is clear an indication of his intention, I may, and ought to lay down a strong reasoning to be drawn from the words *executors, administrators, and assigns* (2), immediately preceding the clause for survivorship; for his meaning was, that in case the daughter should die before the portion was raised, that the executors should be intitled to have the £1000 l. raised off the estate.

It is circumstances, as I said before, must govern in cases of this nature, and here are very strong ones: Lady Lowther married sixteen years, survived her father twenty, and died a year before her mother; and because of this accident of mother's surviving, it is insisted that I am to adhere to strict law and not suffer the portion to be raised; this must sound oddly in a court of equity.

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There is no doubt, if a bond had been entered into by Condon, on condition to pay £1000 l. to his daughter, after death of his wife, but it would have been forfeited, if the daughter's executors had refused to pay after the wife's death, withstanding she survived the daughter.

(1) *Smith v. Partridge*, Amb. 266. ante 129.

(2) But see *Maybank v. Brooks*, 1 Cha. Rep. 84. *Hutchinson v. Ham* 3 Bro. Cha. Rep. 128.

In the case of *Bruen v. Bruen*, 2 Vern. 439. * where the portion was to come out of land, tho' there was no time of payment fixed, yet the child dying at five years old, the Court would not raise it: so that by this case it is plain, that equity does not always keep to strict rules; for when no time of payment is fixed, a legacy in general is held to be paid immediately; and yet the Court then deviated from the general rule, by decreeing it not to be raised, because the child died so young, that the end for which it was given ceased.

If payment is fixed, a legacy in general is held to be paid immediately, unless the end for which it was given ceased.

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Had the father entered into a bond to pay 1000*l.* to his daughter, after his wife's death, it would have, been forfeited, if the executor had refused to pay. When no time for which it was

On the whole, I think the intention is extremely clear under this will, that the portion should be raised, and that the postponing the time of payment was only for the convenience of the estate, because it would have distressed the son to have raised it in the mother's life-time, before her jointure fell in (1).

The postponing of the payment here was only for the convenience of the estate, because the son would have been hurt, if raised before his mother's jointure fell in.

* Note, in *Cases in Equity Abridged*, 267. it is mentioned, that the daughter died within the year, though not taken notice of in Mr. Vernon's report of *Bruen* versus *Bruen*.

(1) The former decree was affirmed. *Reg. Lib. B. 1740. fol. 356.*

Sir John Barnardiston versus Lingood, February 9, 1740.

Case 121.

SIR John Barnardiston, remainder in tail in the estate in question, being distressed in his circumstances, conveys the manor of *Ratton Magna* and *Ratton Parva* in *Suffolk*, of the yearly value of 300*l.* expectant upon an estate for life in his uncle, Sir Samuel Barnardiston, for the sum of 300*l.* only, to the defendant, Mr. Lingood, his heirs and assigns for ever, from and after the decease of Sir Samuel Barnardiston, without issue male.

S. C. Barn. Ch. Rep. 337. Sir J. B. re- 401
remainder in tail in the estate in question, being distressed, conveyed two manors of the yearly value of 300*l.* expectant on an estate for life in

his uncle, Sir Samuel Barnardiston, for the sum of 300*l.* to the defendant, his heirs and assigns, from and after the decease of Sir Samuel Barnardiston, without issue male.

Sir J. B. brought a bill to be relieved against this bargain, as unconscionable. Lord Hardwicke held it a void conveyance, even in point of law, for as the plaintiff had a remainder in tail only, he could but convey such estate as he had, and not dispose of the inheritance (1).

The original bill is brought by Sir John Barnardiston, to be relieved against this bargain, as being an unconscionable one, and made without a proper consideration.

The cross bill by the defendant to establish the agreement between him and the plaintiff for the sale of these manors, and for a specific performance.

LORD CHANCELLOR,

The first consideration is, if the plaintiff in the cross cause is intitled to a decree for a specific performance of this agreement.

(1) See *Lawley v. Hooper*, post. 3 vol. 278. note, and *Willis v. Jernegan*, post. 251.

I am

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LINGOOD.

I am of opinion here are no grounds for the Court to make such a decree; for I am inclined to think it a void conveyance even in point of law: for it is a conveyance of the manor therein mentioned to Mr. *Lingood*, *habendum* to him, his heirs and assigns for ever, from and after the decease of Sir *Samuel Barnardiston*, without issue male: now, as the plaintiff in the original cause had a remainder in tail only, he could but convey such estate as he had; but this is an attempt to dispose of the whole inheritance of the estate.

A person who conveys an estate tail, conveys *totum statum suum*, which is an estate for life; and as this deed only carries an estate for life, it is not such an estate as the parties contracted for, and therefore void.

A person who conveys an estate-tail, conveys *totum statum suum*, which is an estate for life (1): it is one thing, where an estate-tail takes place in possession, and where it is to vest *in futuro*; this is *habendum* a remainder after the death of tenant for life, and consequently vests nothing in the defendant, for springing use cannot be limited; and as this deed only carries an estate for life, it is not such an estate as the parties contracted for, and is therefore void. *Vide* the case of *Brayne versus Deakin* in the House of Lords.

In the case of a hard bargain, where it is not absolutely executed, but executory only, the constant rule of the court is, to carry it into execution.

The uncle, Sir *Samuel Barnardiston*, was living, who was in possession of the estate, and the father of the plaintiff likewise was living, under whom the plaintiff claimed as last remainder man, at the time of this agreement: the parties too were not absolutely sure, whether the estate consisted of one or two manors; so that the plaintiff did not know for certain what he sold nor the defendant what he purchased: and taking it then in the fairest light, the Court ought not to decree a specific performance of a bargain made entirely in the dark.

A judgment of 6000*l.* being taken at the time of the purchase as a security for the performance, Lord *H. rdwick* directed it should stand only as a security for principal, interest, and costs, and no further.

This being the case, I cannot think of leaving the plaintiff in the original cause at the defendant's mercy, to put a judgment of 6000*l.* in suit, which he compelled, or rather drew in the plaintiff to give at the time of the agreement, as a security for the performance of it.

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I am of opinion, therefore, upon the circumstances of the case, it is just in the court to set the thing right for the benefit of all the parties: and, in the first place, I must relieve the plaintiff in the original cause; and, for this purpose, do decree that the judgment shall stand as a security only for the defendant's principal, interest, and costs, and no further.

There are all the material ingredients in this case, as in those which have been cited, to set aside this agreement as a catching bargain against a necessitous heir.

For, without doubt, there are all the material ingredients in this case, as well as in those which have been cited of *Car Arglasse versus Muschamp*, 1 *Vern.* 75. 135. 237. and *Ber. versus Pitt*, 2 *Vern.* 14. and *Knot versus Johnson and Grate* 2 *Vern.* 27. to set aside this agreement as a catching bargain against a necessitous and improvident heir.

(1) See the *Essay on Uses and Trusts* 427.

The very advancing money in such small sums, as has been done in the present case, as three guineas, six guineas, &c. shew the plaintiff to be in the utmost distress; and as to the hazard the defendant run of it's being a losing bargain, it is a circumstance in common only with all people who are dealers in this way, and if this had been a reason for carrying such an agreement into execution, there never would have been any of them set aside; but what the Court is guided by in all these cases is, the taking an undue advantage of an heir's being in distressed and necessitous circumstances; and this is the principal ground of these decrees.

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What guides the court in all these cases is, the taking the advantage of an heir's being distressed, and is the principal ground of these decrees.

Here is no more than three hundred pounds given for an estate of three hundred pounds a year, which is but one year's purchase of a reversion that was to fall in upon the death of a person who was turned of fifty, and not likely to marry, so that the hazard the contracting party run was very small.

The conveyance is dated on the 6th of *January*, 1730, and the first receipt the plaintiff gave, which was for fifteen guineas, was but the *May* before, expressly recited to be in part of payment for the reversion of *Ratton Magna* and *Ratton Parva*, 10*l.* in another, 6*l.* 6*s.* in another, and 20*l.* in another receipt, and so on, and all of them recited to be in part of the purchase-money; and if this had been a fair transaction, the Court would have decreed the plaintiff to convey on such receipts.

But can this be said to be a fair way of purchasing estates, to furnish a young heir with money from hand to mouth, and barely enough to buy him necessaries in the life-time of his ancestor.

As to the hazard which the purchaser run, I have said before that this court have always extended their relief in such cases, and with the greatest justice in the world, for the sake of the public, to prevent peoples' gaming, as it were, to the prejudice and damage of young improvident persons, and the heir of families.

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The Court have always extended their relief in such cases for the sake of the public, to prevent peoples' gaming

to the prejudice of improvident persons, and the ruin of families. Costs decreed to Sir *John Barnardiston*.

I cannot do proper justice, in this case, unless I decree costs to the defendant in the cross cause; I shall reserve the consideration of costs in the original cause, till the Master shall have taken an account of what is due to the defendant in the original for principal and interest, at the rate of 4*l.* per cent. on the sums advanced by him at different times (1).

(1) The defendant *Lingood* was decreed to pay the plaintiff his costs in the original cause, and the cross bill was dismissed with costs. *Reg. Lib. A.* 1740. fol. 268.

Case 122, *The Archbishop of York and Doctor Hayter versus Sir Miles Stapleton and others*, February 21, 1740.
Jay. v. Hutchinson
M. v. Steen. 235

A lessee of a rectory for three lives who had made a derivative lease, brings a bill for tithes in kind, and to establish a custom of setting out corn in stooks:

Lord Hardwicke held the bill is properly brought, though the tithes are out in lease, to prevent collision between a lessee and occupiers.

THE Archbishop of York was intitled, *in jure ecclesie*, to the rectory of *Mitton*, in *Yorkshire*; and, in 1733, granted a lease for three lives to Archdeacon *Hayter*, who made a derivative lease to one *Taylor*; and this bill is brought by the Archbishop and Doctor *Hayter* for an account of tithes in kind, and to establish the custom of setting out the corn in stooks or stacks.

It was objected, that there is no foundation for this bill, because Doctor *Hayter*, having made a lease to *Taylor*, is not intitled to any account, and cannot maintain a bill to establish a custom of setting out in stooks or stacks, which is a mere right.

LORD CHANCELLOR.

I am of opinion, the bill to establish the custom is well brought; and that the person who is intitled to the inheritance is properly made a party, notwithstanding the tithes themselves were out in lease at the time for which the account is prayed for otherwise it might introduce great inconveniences, by a collision between the lessees and the occupiers: and that a bill may be even brought, without praying an account, to establish a mere right only, appears from the common case of bills for establishing *modus*, and therefore shall direct an issue to try the custom of the stacks or stooks.

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The course of proceeding in the court of Exchequer, is a decree an account of tithes from the filing of the bill (1), but it will be time enough when the cause comes back after trial to search for precedents here, in tithe bills, though I know the rule of this court in general is, where an account is directed that it shall be carried down even to the time of the Master's report and not to the filing of the bill only.

A defendant must take advantage of a defect in form by a demurrer, it is too late to object after he has answered.

The plaintiff could not properly amend his original bill, by filing new matter which has arisen since the original bill, but ought to have brought a supplemental bill; but then the defendant should have taken the advantage of this defect in form, by demurrer, and it is too late to make the objection after they have answered.

Next, with regard to the matter of right, as to lands for which an exemption is insisted on, against a demand for tithes in kind, though the charge in the bill is general, yet in the answer you must shew the exemption of the particular class which is not done in this case.

The question of right is upon an exemption claimed of all the lands that did belong to the monastery of *St. Mary*, in the

(1) *Vide Bill v. Read*, post. 3 vol. 590.

hbourhood of *York*, which was one of the greater abbies dissolved by the stat. of 31 H. 8.

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is certain they are discharged in the hands of the Crown, their grantees, in the same manner they were in the hands of the monastery at the time of the dissolution: but the evidence is exemption depends upon usage; now it has been very clearly said, that a posterior usage is evidence of the antecedent, and has been always allowed so in cases of this nature, for what evidence can be had?

Evidence of an exemption depends on usage, and a posterior one is evidence of the antecedent, for no other can be had.

has been objected, there has been unity of possession of the land and the tithes in the *Stapleton* family, and that occasions obscurity, and accounts for the non-payment of tithes; but the ancient lease produced by the defendants where there is a grant that one of the ancestors of this family shall hold tithe is an answer to this objection.

The next question is, as to the real composition for *main meadow* of about 200 acres, in which it is insisted five acres, called *acres*, are set apart in lieu of tithes for the rest.

is very natural to think that the denomination of tithe acres first from those acres being set apart from the rest, in lieu of tithes; and it is a strong circumstance in favour of the defendants, to shew that this meadow is exempt from tithes.

has been said, and very rightly, a *modus* to take part of the tithes for the whole, could never have been at any time a satisfaction for the whole, and has always been held a void custom: in this case it is impossible to say, whether 300 years ago five acres might be a sufficient composition for the tenth part of the whole, and therefore the objection fails as to the inequality between five acres and two hundred.

there are so many obscurities, that the Court cannot determine clearly, without directing a trial at law: for a jury will much better opportunities of unravelling this difficulty from view of the lands themselves, and the boundaries, &c. will usually quiet this question.

1st issue, As to the manner and method of tithing.

2nd issue, As to the exemption.

3rd issue, As to the real composition.

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A *modus* to take part of the tithes for the whole, has always been held a void custom.

and others versus *Montgomery*, second Seal after *Hilary* Case 123. Term, February 26, 1740.

1st issue had been directed to try the validity of the will of *Lord Hardwicke*, *Elias Turner*, Esq. and a verdict was found in favour of the will; this court was afterwards pleased to give the defendant his costs, on the cause coming back on the equity reserved, on his promising to give no further trouble (1): since the first time, the defendant has brought his ejectment at law, and has petitioned to have the cause re-heard; and likewise brought a new issue, charging new matter discovered since the decree, in

thought a defendant making a usual deposition petition for a rehearing was a great hardship on a plaintiff, and not an adequate compensation.

(1) See *ante* 112.

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MONTGOMERY

order to prevent the plaintiff in the original bill, from getting his decree signed and inrolled.

Mr. *Chute* moved that the original plaintiff might have time allowed him to answer the new bill, till the first cause is heard, because this would give his client an opportunity of inrolling the decree, and pleading it in bar to the new suit.

Lord Chancellor denied the motion, because he found it to be a practice of the court, when he came to the seals, to allow the method of proceeding the defendant has taken in this case, be said, at the same time it was an extreme hardship on the plaintiff, that he should be obliged to acquiesce upon the defendant making the usual deposit only in case it should be decreed against him upon the re-hearing, which he thought was not an adequate compensation, and therefore will think of some rule which he will establish for the future in cases of this kind, and there never will be an end of suits, and for the present, allow the defendant in the new bill, and plaintiff in the former, six weeks to plead, answer, or demur*.

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* The 17th of *October*, 1743, *Lord Hardwicke* made the following order: That if supplemental or new bill, in nature of a bill of review, grounded upon any new matter discovered, or pretended to be discovered, since the pronouncing of any decree of the court, in order to the reversing or varying of such decree, shall be exhibited without the special leave of the Court first obtained for that purpose; and unless the party exhibiting the same do first deposit with the Register of this court so much money together with the deposit by the rules of this court to be made, on obtaining re-hearing of the cause wherein such decree was pronounced, will make up the sum of fifty pounds, as a pledge to answer such costs and damages as shall be awarded the adverse party, in case the Court shall think fit to award any at the hearing of the cause on such supplemental or new bill. And to the end all parties may take notice of this order, it was directed to be entered with the Register, and put up in the office of the six clerks, and register of this court.

Case 124.

Louther versus Carlton, February 27, 1740.

S. C. post. 242.
S. C. Barn. Cha.
Rep. 353.

A bill brought to redeem against the defendant, who had notice of the plaintiff's title, but bought of the Marquis of *Wharton*, who had no notice,

THE plaintiff, who is intitled to the equity of redemption in certain lands, has brought his bill against the representatives of the Marquis of *Wharton*, who was the first purchaser, and likewise against *Carlton*, who was the second purchaser; the plaintiff has not replied to the answer of the representatives of the Marquis of *Wharton*; and the question is Whether they should not have been brought before the court as proper parties.

the objection allowed for not bringing the representative of the Marquis before the court, or otherwise *Carlton* would be deprived of that defence.

LORD CHANCELLOR,

The representatives of the Marquis of *Wharton* deny he had any notice of the plaintiff's title at the time he purchased, and it is admitted on all hands, that *Carlton*, who purchased of the Marquis, had notice of the title: now, if I should go on with this cause, I should deprive Mr. *Carlton* of the benefit I would have from the defence which is set up by the representatives of the Marquis; it is like the cases at law of tenants

by warranty, &c. where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of use or advantage to him in strengthening his own case.

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CARLTON.

The plaintiff's offer of waiving his demand of an account of rents and profits, in the time of the Marquis of *Wharton*, might have removed this objection with regard to these defendants, if there had not been a difficulty in another respect, the depriving Mr. *Carlton* of the benefit of that defence which is set up by the representatives of the Marquis, namely, the denial of notice, and that brings it, as I said before, to the cases of law, at praying in aid: and for this reason, his Lordship allowed the objection for want of parties in not bringing the representatives of the Marquis of *Wharton* before the court.

Proctor versus Oates, February 28, 1740.

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Case 125.

A Bill was brought to redeem after the possession of a mortgagee from 1707, to 1732, the year in which the bill was filed; the defendant, as it is a family affair, submitted by his answer, to be redeemed, notwithstanding the length of time: Lord Chancellor said, he saw no colour for the redemption; but on the defendant's submission, he decreed an account of what was due for principal, interest, and costs, and directed the plaintiff to pay the same in six months after the Master's report; and thereupon the defendants were to convey; but, in default of the plaintiff's payment as aforesaid, the bill was to be dismissed without costs (1).

After a possession of a mortgagee for 25 years, the Court decreed a redemption on the defendant's submitting by his answer to be redeemed.

(1) See *Aggas v. Pickerell*, post. 3 vol. 225.

Franks versus Carry, February 28, 1740.

Case 126.

WHERE a lord of a manor brings a bill for quit-rents, and produces an account in order to support his right, it must be proved to have been the account of some steward or bailiff, who, by marks against the particular items of receipts, appears manifestly to have collected them, and his name besides must be placed at the bottom; but if there are not such marks, nor any name of steward or bailiff, it may be only a paper of rents drawn out of any book by a lord of a manor himself, for his own private use, and is not evidence of the payment here, any more than it would be at law (1).

A bill for quit-rents, and an account produced, it must be proved to have been a steward or bailiff's, or is not evidence of payment here any more than at law.

(1) This point does not appear in the Register's book. *Reg. L.b. A. 1740. fol. 301.*

Case 127. *Sir Thomas Janſon, Bart. verſus Rany, March 3, 1740.*

Where the evidence of a ſingle witneſs againſt a negative in a defendant's answer is corroborated by a great number of circumſtances, it is ſufficient to ſupport an equity.

THE bill was brought to have execution ſtayed, upon a judgment obtained at law by the defendant, on a bond, which the plaintiff inſiſts has been ſatisfied long ſince.

LORD CHANCELLOR,

Where a man comes to be relieved againſt a proper demand at law, it is not ſufficient to ſupport an equity to have on ſingle evidence againſt the defendant's negative in his answer and this is the rule undoubtedly; but the preſent is not this caſe, becauſe the evidence produced by the plaintiff does not rely upon this ſingle proof only, but it is ſupported and corroborated by a great number of circumſtances which takes it entirely out of the rule (1).

[141] The caſe here is ſo ſtrong in favour of the plaintiff, that I ſhall decree coſts againſt the defendant, both at law and in this court to be taxed by the Maſter.

(1) *Walton v. Hobbs, ante 19.*

Case 128. *Stockdale verſus The South-ſea Company, March 5, 1740.*

S. C. Barn. Cha.
Rep. 363.
The perſon
whoſe name
is entered in
the South-Sea
company's book,
is, with regard
to them, the proprietor.

THE South-Sea company have no more right to inquire who is the true proprietor, when the truſt does not appear, than a lord of a manor into a right to a copyhold eſtate when no truſt appears, for the perſon whoſe name is entered in their books, is to all intents and purpoſes, with regard to the company, the proprietor.

*See of Beaufort
in
Held.*

Ch. v. Fane. 248

A court of equity will never decree a perſon to purſue a miſtake, or effectuate an act (which he had done through ignorance) after he comes to the knowledge of the reality of the fact.

Which is the South-Sea company's caſe here, who acted under a miſtake with regard to this ſtock, as imagining it to be the property of one perſon, when in fact it had been transferred long ſince, and the property of another.

Grimes versus French, the same Day.

Cafe 129.

THOUGH you pray general relief by your bill, you may at the bar pray a particular relief, that is agreeable to the case you make by your bill, but you cannot pray a particular relief which is intirely different from the case (1).

You may at the bar pray a particular relief, though by your bill you have prayed a general one.

As here, the bill is brought for an annuity or rent-charge of ten pounds *per ann.* left under a will, and the counsel for the plaintiff pray at the bar, that they may drop the demand of this annuity, and insist upon the land itself, out of which the annuity issues, but the Chancellor denied it, because it came within the rule before laid down.

(1) See *ante* Stapleton v. Stapleton, Dixon v. Parker, 2 Ves. 225. Bennett v. 1 vol. 6. Attorney General v. Jeanes, Vade, post. 325. Weymouth v. Boyer, ante 1 vol. 355. Cook v. Martyn, ante 3. Ves. jun. 426. Dwmer v. Fortescue, post. 3 vol. 132.

Gyles versus Wilcox, Barrow, and Nutt, March 6th, 1740. Cafe 130.

A Bill was brought by Fletcher Gyles, bookfeller, for an injunction to stay the printing of a book in octavo, intitled *Modern Crown Law*; it being suggested by the bill to be colourable only, and in fact borrowed *verbatim* from Sir Matthew Hale's *Pleas of the Crown*, only some old statutes have been left out which are now repealed; and in this new work all the *Latin* and *French* quotations in the *Historia Placitorum Corone* are translated into *English*; and for this reason it is insisted the defendant is within the letter of an act of parliament, made in the eighth year of queen *Ann*, c. 19. intituled, An act for encouragement of learning, by vesting the copies of printed books in the authors, or purchasers of such copies, during the term of fourteen years (1).

S. C. post. 3 vol. 269. Barnard. Chanc. Rep. 368. S. C.

William v. Wilcox
Barrow & Nutt
14 Feb. 1740

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James v. Wilcox
Strange
1 March 1740
25. 8.
2 B. 404. 11. 0

SECT. 1. "From and after the tenth day of April 1710, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookfeller or book-sellers, printer or printers, or other person or persons, who shall or have purchased or acquired the copy or copies of any book or books, in order to print or re-print the same, shall have the sole right or liberty of printing such book and books for the term of 21 years, to commence from the said tenth day of April, and no longer, and that the author of any book or books already composed and not printed and published, or that hereafter shall be composed, and his assigns or assigns, shall have the sole liberty of printing and

(1) With respect to this act, see the case of *Millar v. Taylor* very fully reported in 4 Burr. 2303. and the cases cited therein. See also *Pope v. Curl*, post. 342. *Carnan v. Bowles*, 2 Bro. Chanc. Rep. 80.

GYLES v.
WILCOX.

" re-printing such book and books for the term of 14 years, &
" commence from the day of first publishing the same, and
" no longer; and that if any other bookseller, printer, or
" other person whatsoever, from and after the tenth day of
" April 1710, within the times limited by this act as aforesaid,
" shall print, reprint, or import, or cause to be printed, re-
" printed, or imported, any such book or books, without the
" consent of the proprietor or proprietors thereof first had and
" obtained in writing, signed in the presence of two or more
" credible witnesses, or, knowing the same to be so printed, or
" reprinted, without the consent of the proprietors, shall sell,
" publish, or expose to sale, or cause to be sold, published, or
" exposed to sale, any such book or books, without such consent
" first had and obtained as aforesaid, then such offender or offend-
" ers shall forfeit such books, and all and every sheet and sheets
" being part of such book and books, to the proprietor or pro-
" prietors of the copy thereof, who shall forthwith demand and make
" waste paper of them: and further, that every such offender
" or offenders shall forfeit one penny for every such sheet which
" shall be found in his or their custody, either printed or print-
" ing, published or exposed to sale, contrary to the true intent
" and meaning of this act, the one moiety thereof to the queen,
" her heirs and successors, and the other moiety thereof to any
" person or persons that shall sue for the same, to be recovered
" by action of debt, bill, plaint or information."

Mr. *Browning*, counsel for the plaintiff, cited the case of *Read* versus *Hodges* before Lord *Hardwicke*, as a case in point that was an attempt to prejudice the author of the life of *Czar Peter the Great*, by publishing it in one volume, which was word for word the same with *Motley's*, only several pages let out together which had appeared in the 3 volumes.

LORD CHANCELLOR,

The case of *Read* versus *Hodges* was upon a motion only, and at that time I gave my thoughts without much consideration and therefore shall not lay any great weight upon it.

As to what has been said by Mr. Attorney General of the act being a monopoly, and therefore ought to receive strict construction, I am quite of a different opinion, and that it ought to receive a liberal construction, for it is very far from being monopoly, as it is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompence for their pains and labour in such works as may be of use to the learned world.

The question is, Whether this book of the *New Crown Law* which the defendant has published, is the same with Sir *Matthew Hale's Histor. Placit. Corone*, the copy of which is now the property of the plaintiff.

Where books are colourably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgement.

The statute of 8 Ann, c. 19. for vesting the copies of books in authors is not a monopoly, but ought to receive the most liberal construction.

Books colourably shortened only, are within the meaning of the act.

B

this must not be carried so far as to restrain persons from
; a real and fair abridgment, for abridgments may with
propriety be called a new book, because not only the paper
int, but the invention, learning, and judgment of the
is shewn in them, and in many cases are extremely use-
ough in some instances prejudicial, by mistaking and
ng the sense of an author (1).

ould extend the rule so far as to restrain all abridg-
it would be of mischievous consequence, for the books
earned, *les Journaux des Scavans*, and several others that
e mentioned, would be brought within the meaning of
of parliament.

e present case it is merely colourable, some words out
Historia Placitorum Coronæ are left out only, and transla-
ren instead of the *Latin* and *French* quotations that are
d through Sir *Matthew Hale's* works; yet not so fla-
the case of *Read* versus *Hodges*, for there they left out
pages at a time; but I shall not be able to determine this
, unless both books were read over, and the case fairly
etween the parties.

Attorney General has said I may send it to law to be
ned by a jury; but how can this possibly be done? it
be absurd for the chief justice to sit and hear both books
ver, which is absolutely necessary, to judge between
whether the one is only a copy from the other.

CYLES v. WILCOX.
An abridgment fairly made is a new book, because the judgment of the author is shewn in it.

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This is not a case proper for law, as it would be absurd for a judge to sit and hear both books read over, which is necessary,

where one is only a copy from the other.

court is not under an indispensable obligation to send all
a jury, but may refer them to a master, to state them,
is a question of nicety and difficulty, and more fit for
learning to inquire into, than a common jury.

I think is one of those cases where it would be much
or the parties to fix upon two persons of learning and
in the profession of the law, who would accurately
efully compare them, and report their opinion to the

The parties ought to fix on two persons of learning in the law, to compare the books, and report their opinion.

House of Lords very often, in matters of account which
emely perplexed and intricate, refer it to two merchants
by the parties, to consider the case, and report their
upon it, rather than leave it to a jury; and I should
reference of the same kind in some measure would be the
ft method in the present case (2).

The House of Lords, in matters of account which are intricate, refer it to two merchants named by the parties, to consider the case, and report their opinion upon it.

Mill v. Walker and Debrett, 1 Bro. P. 451.

(2) The Case was accordingly referred to an award. *Reg. Lib. d. 1740. fol. 274.*

Case 131.

Gratwick versus Simpson and Moore, March 9, 1740.

Where no demand has been made on a bond for 20 years, the judge will direct a jury to find it satisfied.

THE judges have laid it down now as an invariable rule that if there be no demand for money due upon a bond for twenty years, that they will direct a jury to find it satisfied from the presumption arising from the length of time (1).

(1) *Moreland v. Bennet*, 1 Stra. 652. *v. Newnham*, 1 Vef. 51. *Rex v. Stephen Searle v. Barrington*, 2 Stra. 826. 3 P. 1 Burr. 434. 4 Burr. 1963. *Oswald W.* 397. 3 B. P. C. 535. *Powell v. Legh*, 1 Durn. and East, 270. *Cadfael*, Rep. Temp. Finch, 77. *Leman*

Case 132

Vernon versus Blackerby, March 10, 1740.

S. C. Barr, Cha. Rep. 577, more fully reported. It never was the intention of the act for building the 50 new churches, that there should be a suit in the ordinary courts of justice; the commissioners are the persons to determine any dispute.

LORD CHANCELLOR: This is one of the most extraordinary bills I ever remember; and there is no foundation for relief either in law or equity: it is brought against Mr. *Blacker* who is nothing but an officer under the commissioners for building the fifty new churches.

It would be absurd if a bill should lie against a person who only an officer, and subordinate to others, and has no direct power.

It has been insisted by the plaintiff's counsel, that it is necessary to bring the commissioners before the court, but that is very sufficient to have the treasurer Mr. *Blackerby* who issues out the money: and they have compared it to the case of *Bubble*, in the year 1720.

But this is by no means like that case, for there although several persons were interested, yet they lodged a general power and authority in some few only, and therefore, to avoid inconvenience from making such numerous parties, this court restrained them to those particular persons who were intrusted with this general power.

The several parts of the relief prayed are these.

First, that the defendant should pay the interest of two thousand pounds from *Michaelmas* 1730, to the *Michaelmas* following, which is prayed to be paid out of the gross fund given the first of the late King, before it was vested in *South-Sea* annuities.

Secondly, that the plaintiff may be paid interest from *Lammas* 1733, to the *Michaelmas* following out of the sum of the thousand pounds.

Thirdly, that interest may be paid out of the residue till it is placed out in land.

As to the question whether the plaintiff is come into a proper court:

I am of opinion that he is not, for it never was the intention of these acts of parliament, that he should come into ordinary court.

courts of justice; and I may compare it to acts of parliament which give toll, or turnpike acts: the commissioners are to determine any dispute arising upon these acts.

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BLACKBURN.

But suppose I was not to make this construction upon the legal statutes relating to the fifty new churches.

The proper method even then would have been to move the court of King's Bench to have granted a *mandamus*.

For if the commissioners or their officers do any thing improper, the court of King's Bench will oblige them to make a return to the *mandamus*.

If the commissioners do any thing improper the court of King's Bench will grant a *mandamus*.

But as the acts of parliament expressly direct that the commissioners should account for the distributions of this branch of the revenue before the auditors of the treasury, if there is any grievance there can be no relief, but upon an application to a court of revenue; for if I should direct an account before a Master, the two accounts would clash; nor do I know any thing that could give me a jurisdiction unless there were some fraudulent circumstances.

The commissioners are by the act directed to account before the auditors of the treasury, and if there is any grievance, the relief is by applying to a court of revenue.

I am of opinion all these several acts of parliament must be taken together, or otherwise it would be a most inconsistent system.

The several acts relating to this matter, must be taken together.

" 10 Q. Anne, c. 11. s. 7. says, the money so to be issued as aforesaid shall be paid unto such person or persons, not being of the number of the commissioners, for the ends and purposes aforesaid, as her majesty, her heirs and successors, shall from time to time direct or appoint, to be the treasurer or treasurers on this behalf, and shall be received by him or them by way of imprest, and accounted for only by such treasurer or treasurers, and shall be disbursed, expended and applied, by such treasurer and treasurers respectively, according to such orders and warrants as he or they shall receive from the commissioners, or any five or more of them, for all or any of the uses by this or the former act prescribed or allowed, and not to any other use, intent or purpose whatsoever; which said treasurer and treasurers shall be respectively accountable in the Exchequer for the same."

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I read this clause relating to the treasurer, to shew that it is clear he could not issue a penny without a previous order from the commissioners.

1 Geo. 2. stat. 2. c. 23. s. 2. and 4. relates to the maintenance of the ministers of the fifty new churches.

3 Geo. 2. c. 19. s. 1. "enacts, that the sum of 3000l. of lawful money of Great Britain, &c. shall be allotted and appointed for and as the share and interest which the rector for the time being of the said new parish church in or near Bloomsbury market shall have or be intitled to out of the same monies; and the treasurer for the time being is hereby required by and out of the first monies which are or shall be issued to him, as soon as conveniently may be, to lay out and
" disperse

VERNON v. BLACKEBERRY. “ dispose of the said sum of 3000*l.* or any part thereof, according to such orders and warrants as he shall from time to time receive from the commissioners, any five or more of them, purchasing lands, &c. to be conveyed to and settled upon and to the use of the said new church for the time being, and his successors in the said church for ever, for and towards his and their maintenance, to be laid out in the mean time on real securities, or in the publick funds, and the interest and produce to the rector.”

[147] There is some variation in the penning of this act, but no such as to create any difference in the authority or power of the commissioners.

Nothing can issue by order of the treasurer, without a previous one from the commissioners. For if there had been no such clause of orders and warrant under commissioners hands, I should still have been of opinion from the general tenor of those acts of parliament, that nothing could have issued by order of the treasurer without a previous order from the commissioners.

If this be so, then with regard to the other relief that is prayed as to the dividend on the *South-sea* annuities from *Lady-day* 1733, to *September* the fifth following, the treasurer being an officer only, and obliged to pursue the directions of the commissioners, though possibly an order might not be wanted for every particular sum, yet for every half year's dividend there certainly ought to be one.

It is improper to make a person who acts ministerially only, sole party. I should think the commissioners only, and not the treasurer ought to have been parties, for it is absurd to make a person who acts ministerially the sole party.

I agree that it was the intention of the legislature, that if the money could not be laid out in land before 1730, that the minister for the time being should not be without a maintenance and that it should have been paid out of the gross produce.

But here was no minister, for Doctor *Vernon* was not intitled till *February* 1730, and yet he had interest from the *Michaelmas* before; but the plaintiff is so unreasonable as to ask for the time that he was not minister, from the *Midsummer* before: it is most absurd that a new rector should expect to diminish a gross fund before he was actually instituted, or in any sort of possession whatever.

When there are sales of *South-sea* stock in this court, if it is sold during the running of a dividend, and before the half year is complete, it cannot be separated.

The money has been laid out in land, and therefore it is impossible to have the very money, unless I would decree a sale of so much of the lands; and, according to the opinion I have already given, this ought not to be done without an order of the commissioners: nor will I direct a sale of part of the annuities to raise the sum prayed by Doctor *Vernon*, unless I had the commissioners before the court.

The cause was ordered to stand over for want of parties upon the plaintiff's paying the costs of the day.

Lloyd and Jobson versus Spillet and others, in the Paper of Re- Case 133.
hearings, March 12, 1740.

JOH*N* Stamp being seised of a considerable real estate, and possessed of a large personal estate, made his will dated the 28th of March 1721, and afterwards a codicil of the 10th of October 1721, and appointed John House and John Spillet his trustees, to see what he had done in his life-time be continued as he ordered, and then gave his cousins Anne and Mary Jobson 15l. a year a-piece during their lives, and directed his trustees to improve all his estate to the best advantage, and that the yearly profits thereof should be given to and for the yearly maintenance of such ministers, as were called by the name of Presbyterian and independent ministers, that do not receive above 40l. a year for their preaching; the testator afterwards added Richard Froome to the other two trustees, and on the 7th of December, 1721, there was an indenture of release duly executed between John Stamp, of the one part, and House, Froome, and Spillet of the other part, witnessing that Stamp, as well for and in consideration of the natural love and affection which he bore unto his cousins House, Froome, and his friend Spillet, and also in consideration of ten shillings paid by them, granted to them several messuages and farms therein mentioned, to hold to them, their heirs and assigns, to the use of them, their heirs and assigns for ever; provided always, &c. that if Stamp should at any time during his life tender or pay to House, &c. 10s. on purpose to make void the said deed and the estates thereby conveyed, then the deeds and the estates thereby limited should be void. John Stamp did also execute a deed-poll of his personal estate to House, Froome, and Spillet, whereby John Stamp, in consideration of ten shillings, and other good causes, bargained and sold to House, &c. all his goods and chattels, to hold to them, their executors, &c. and put them in possession of all the premises by the delivery of five shillings to them; and it was agreed between the parties, that Stamp should have the rents and profits of the premises during his life for the maintenance of himself and family, and a power was reserved to Stamp to make void this deed by any deed or writing, and to dispose of the premises as he should think fit; and he had power also to revoke the lease and release.

S. C. 3 P. W.

244.
S. C. Barnard.
Chanc. 384.

Seaman v. b.

Russell.

Sturges v. S.

M. c. Hec.

Dale

Hamell

S. Hare...

The bill is brought by the plaintiffs as heirs at law to John Stamp, and the end of it is, that the defendants may convey John Stamp's real estate to the plaintiffs and their heirs, and account for the rents and their share of the personal estate, and deliver up the deeds of bargain and sale, and lease and release, and the title deeds.

The defendants insist on their right to the real and personal estate by virtue of the will and conveyances of John Stamp, and in regard it is by his will declared that if his heirs should commence

LLOYD v.
SPILLET.

mence any suit relating to his will, that then it should be void: they submit to the court, that if the plaintiffs had any title to their annuities of fifteen pounds each, they have forfeited the same by bringing this suit (1).

Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand

First, With regard to the personal estate: I am of opinion there are no grounds for the present plaintiffs to be relieved, according to the prayer of their bill.

seised, though no other consideration appear.

For here is an assignment, or bill of sale of all his goods and chattels, and all other his substance whatsoever moveable or immoveable, quick or dead, to his trustees during his life, for the maintenance of himself and family, with another proviso to revoke the uses of this deed by any other deed or writing, or even by cancelling without any form or ceremony whatsoever.

A man makes a will antecedent to a deed, in which he has given away all his personal estate to charitable uses.

Now whether a man after a will made reserves a trust in what was his personal property before, or acquired after, the will is ambulatory, till his death, and therefore, as to the next of kin, there is no pretence that the personal estate is devisable under the statute of distributions.

Secondly, As to the legal estate, whether it will pass by the lease and release without a consideration.

Now there are no grounds whatsoever to say that the legal estate did not pass by the lease and release.

For the considerations in it are such as will operate by way of transmutation of possession.

In the first place, here is a consideration expressed of natural affection to two persons, who are not disputed to be very nearly related to the grantor, and here is likewise the consideration of ten shillings (2), but there is no manner of doubt the estate would have passed even without the last pecuniary consideration, under the statute of uses, for natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear (3).

But then it has been insisted, here is not a sufficient consideration to pass the beneficial interest in this estate.

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The consideration of ten shillings it is said is only a form in the conveyance, and not sufficient of itself to pass the estate neither will the consideration of natural love and affection alone pass it.

But I do not think these observations material in the present case.

Consider how it stood at common law before the statute of uses; there was no necessity then that there should be any consideration expressed to pass the estate.

(1) See *Morris v. Burroughs*, ante 1 (3) *Brown v. Jones*, ante 1 vol. 191 and note 3.

(2) See *Young v. Peachy*, post. 256.

r instance in the case of feoffments, there was no con-
n at all mentioned in them, and yet the estate passed by
on the operation of law.

LLOYD V.
SPILLET.

Uses were intro-
duced, during the

tween the two houses of York and Lancaster, to avoid forfeitures, and were exactly the same
trusts are now.

ocess of time, for the sake of avoiding forfeitures to the
when the contests arose between the two houses of York
caster, and likewise to avoid wardships, both of them
raudulent intention to cheat the crown, and the lord, of
law gave them, uses were introduced, and were exactly
with what trusts are now, and I wonder how they ever
be distinguished.

doctrine of a resulting use first introduced the notion that
must be a consideration expressed in the deed of feoff-
or otherwise nothing could pass, but it would result to
for (1).

so it is insisted on here, that though the legal estate passes
statute of uses, yet the beneficial interest will not pass,
is not what the court calls a valuable consideration, and
ently there is a resulting trust for the heir.

now bound down by the statute of frauds and perjuries,
ue nothing a resulting trust, but what are there called
operation of law; and what are those? Why *first*,
n estate is purchased in the name of one person, but the
or consideration is given by another (2); or *secondly*,
a trust is declared only as to part, and nothing said as
est, what remains undisposed of results to the heir at
d they cannot be said to be trustees for the residue (3).

Nothing is a re-
sulting trust under
the statute of
frauds and per-
juries but what
are called so by
operation of law.

not know in any other instance besides these two where
art have declared resulting trusts by operation of law,
cases of fraud, and where transactions have been car-
mala fide.

When an estate
is purchased in
the name of one
person, and the
money is paid by
another, he has a

rust; or where it is declared only as to part, and nothing said as to the rest, what remains un-
results to the heir at law.

'he reader is referred to the Es-
tates and Trusts, 127, to 134.

Vith respect to this position the
g observations occur. If the
tion money is *expressed* in the
be paid by the person in whose
he conveyance is taken, and
appears in such conveyance to
presumption, that the purchase
elonged to another, then parol
not be admitted *after the death*
nominal purchaser to prove a result-
t; for that would be contrary
ature of Frauds and Perjuries.
Webb, Pre. Cha. 84. Walter de
Case ibid. 88. Heron v. Heron ibid.
Wren v. Preston, ibid. 103. Gaf-
Thwing, 1 Vern. 366. Hooper v.
Wren, 480. Crox v. Norton, ante 75.

But if the nominal purchase *in his life-*
time gives a declaration of, or confesses
the trust, then it takes it out of the
statute. *Ambrose v. Ambrose 1 P. W.*
322. Ryall v. Ryall, ante 1 vol. 59, 60.
In Lane v. Dighton, Amb. 409. there was evi-
dence in Mr. Dighton's hand-writing, *that*
the trust stocks had been sold, and the money laid
out from time to time in the purchase of land.
So if it appears on the face of the con-
veyance (whether by recital or other-
wise) that the purchase was made with
the money of a third person, that will
create a trust in his favour. *Kirk v.*
Webb, Pre. Cha. 84. Deg. v. Deg 2
P. W. 414. Ryall v. Ryall, ante 1 vol.
59. Young v. Peuchy, post. 257.

(3) *Cottingham v. Fletcher, post. 156.*

But

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SPILLBT.

But in the present case there is no fraud at all in the grantee but a scheme in the plaintiff's ancestor to secure the charity at all events, supposing he should revoke his will.

The heir at law does not want an express intention to take by a will, though it is otherwise with regard to a deed.

It has been said, that it was not the intention to give this estate to the defendant, and consequently the heir at law is intitled: for the heir at law does not want an express intention; and it is certainly so in the case of a will, but it is otherwise with regard to a deed.

For there, since the statute of Frauds and Perjuries, the lines are exactly drawn with regard to resulting trusts, and the heir at law must shew an express trust for him in order to intitle himself.

A man that conveys a trust to another, and barely for himself, or for the use of his heir at law, does not generally insert a power of revocation, as has been done in the present case.

Upon the whole, I am of opinion that the legal estate did well pass, and the beneficial interest likewise; nor do I believe there was any intention that there should be a resulting trust for the heir at law, but the whole design of the plaintiff's ancestor was to secure the charity at all events.

Lord Hardwicke therefore said, he saw no cause to vary the decree of the 8th of November 1734, and ordered the same should be affirmed; but declared that the plaintiffs, the heirs at law of John Stamp, were intitled to the two annuities of fifteen pounds each, devised to them by the testator for their lives, and directed the arrears and growing payments to be paid to the plaintiffs (1).

(1) Reg. Lib. B. 1740. fol. 155. Reg. Lib. B. 1734. fol. 74.

Case 134.

Wilkins and his Wife versus Hunt, the same Day.

An administrator is not in every case chargeable with interest on account of personal estate.

LORD CHANCELLOR: It is not a rule in all cases, that I should charge an administrator with interest on account of personal estate.

But here has been a possession of a personal estate in the hand of an administrator for thirty years, and part of it was out upon mortgage, which produced interest; but however this point must be deferred till the Master has made his report.

It is not an invariable rule that an administrator should be allowed costs at all events.

As to the costs, let all parties have it to the time of the hearing, and reserve the consideration of other costs till after the Master's report, for it is by no means an invariable rule that an administrator shall be allowed them at all events (1).

(1) Reg. Lib. B. 1740. fol. 144. See *Hildre . Heywood*, ante 126.

Baxter versus Wilson, the same Day.

Cafe 135.

THOUGH a defendant in a cause has made default, you must, notwithstanding, make a decree complete and absolute against him before you can petition for a re-hearing, and serving him with notice of the order for a re-hearing is not sufficient; but though the Chancellor for this defect dismissed the petition for re-hearing, without any prejudice to any new petition in case the party should be advised to it, after the decree is perfected, yet he would not order the deposit to be divided among the parties, who appeared before him on the present petition, because there is nothing done upon it one way or the other (1).

You must make a decree complete against a defendant, though he has made a default, before you can petition for a re-hearing.

The deposit was ordered to be paid back. *Reg. Lib. A. 1740. fol. 221.*

Stiles versus The Attorney General, March 14, 1740.

Cafe 136.

THE late Duke of *Wharton* on the 24th of *March*, 1719, by deed-poll under his hand and seal, "considering that the publick good is advanced by the encouragement of learning and the polite arts, and being pleased therein with the attempts of *Doctor Young*, in consideration thereof, and of the love he bore him, did give and grant unto the said *Doctor Young* an annuity of 100*l.* to hold during his life, out of all and every his manors, messuages, lands, tenements, and hereditaments, to be paid him or his assigns half yearly or quarterly, with a clause of distress in case of non-payment."

An annuity granted by the Duke of *Wharton* to *Doctor Young*, in consideration that the public good is advanced by the encouragement of learning, and in consideration likewise of the love he bore him; this is not a legal consideration, nor does it amount to a valuable one in the eye of the law (1).

By an indenture dated the 10th of *July* 1722, inrolled in Chancery, and made between the said *Philip Duke of Wharton*, the one part, and *Doctor Young* of the other part, reciting the above deed-poll, and also reciting that the said Duke was indebted to *Doctor Young* on the said annuity in 250*l.* to *Midsummer* last, and also in 100*l.* more, making 350*l.* and also reciting that the said *Doctor Young* had at the Duke's special licence and request quitted the service he was in, in the Earl of *Exeter's* family, and thereby lost an annuity of 100*l.* and reciting that the said Duke, being willing to make the said *Doctor Young* some amends for his said loss in quitting the service of *Exeter's* family, had proposed to give him a further annuity of 100*l.* to be paid quarterly in lieu of the said 350*l.* in satisfaction of his said loss in quitting the Earl of *Exeter's* family; it is witnessed, that in consideration, &c. the Duke did give, sell, bargain, and sell to *Doctor Young* one other annuity of 100*l.* besides the said annuity granted by the above-mentioned

James v. Bydder
4 Brev. 600.

(1) See *Jameson v. Skipwith*, 1 Bro. Cha. Cha. Rep. 34.

STILES V.
ATTORNEY
GENERAL.

deed-poll, to hold unto the said Doctor *Young* and his assigns during his life, clear of incumbrances; and the said Duke did thereby charge all his manors, &c. he was intitled to in law or equity, with the said two annuities of 100*l.* each, payable quarterly.

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By a deed dated the 12th of *July*, 1722, the Duke charged the lands in trust to Mr. Justice *Denton*, &c. with the 200*l.* annuity of Doctor *Young*.

A bill brought by the Duke of *Wharton's* judgment creditors in *Hilary* term 1722, in *August* 1723, there was a decree for a sale of the trust-estates, and that the money arising therefrom should be paid to the creditors according to their priority, and the residue to the Duke.

Doctor *Young*, in his examination on the 4th of *Feb.* 1730, before the Master, sets forth at large the considerations of the annuities; and likewise the Duke of *Wharton's* giving him a bond, dated the 15th of *March* 1721, in the penalty of 1200*l.* conditioned for the payment of 600*l.* in consideration of his taking several journies, and being at great expences in order to be chosen a member of the House of Commons at the desire of the said Duke, and in consideration of his giving up two livings of 200*l.* and 400*l.* *per ann.* value, in the gift of *All Soul's College* on the promises made by the said Duke, of serving and advancing him in the world.

On the 26th of *April*, 1740, the bond creditors of the late Duke of *Wharton* brought their bill, setting forth the decree in the former cause; and insisted that all the judgment and other creditors provided for by the said decree had been paid, and that there remained sufficient in the trustees' hands to pay the bond debts, and that the claim of Doctor *Young* is to be considered as a gratuity or present only, and ought to be postponed to their demands.

The Master, on the 16th of *December*, makes a report of Doctor *Young's* demands, and states the several facts before mentioned relating to the two annuities and the bonds, and says that he did not find any pecuniary consideration either for the bond or the annuities, and also states, that several of the creditors of the late Duke for money really lent him are still unpaid, and therefore whether the said demands of Doctor *Young* amounting to 365*l.* should take place of any of the debts subsequent in time which were for a consideration in money, he submits to the judgment of the Court.

LORD CHANCELLOR,

I cannot determine now how far Doctor *Young* is to be preferred to general creditors, or postponed, who are not parties to the decree, as they are not before the Court.

The grant of his first annuity is on consideration that the publick good is advanced by the encouragement of learning and the polite arts, and of the Duke of *Wharton's* being pleased with Doctor *Young's* attempts therein, and in consideration likewise of the love he bore him.

The

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The second annuity is on consideration of the Duke's being indebted to Doctor *Young* in the sum of 350*l.* and in consideration of the Doctor's leaving my Lord *Exeter*'s service, and thereby losing an annuity of 100*l. per ann.* during his life, which the Earl of *Exeter* had before agreed to settle upon him.

As to the first annuity, I am of opinion, that it is not a legal consideration; for though it may be a very good inducement to a person for his doing it, yet it will not amount to a valuable consideration in the eye of the law.

But then Doctor *Young* in his examination before the Master swears that he quitted the *Exeter* family, and refused the 100*l. per ann.* annuity, which had been offered him for his life, provided he would continue as a tutor to Lord *Burleigh*, and this merely upon the pressing solicitations of the Duke of *Wharton*, and the assurances he gave him of providing for him in a much more ample manner.

Giving up a pecuniary advantage at the time an annuity is granted, amounts to a valuable consideration, as much as a sum of money paid down at the time.

If this be the truth of the fact, and it is no where contradicted, it does certainly amount to a valuable consideration.

For it has been truly said, that it will equally arise where a person gives up a certain pecuniary advantage at the time of the grant, as where a sum of money is actually paid down at the time.

And though the grant of the first annuity may be voluntary, taken singly, yet the recital in the second will alter the nature of it, and turn it into a valuable consideration; for as there were arrears on the first, there is no doubt but this was a just and lawful debt, and the promising not to sue for those arrears was a good consideration, and from that time the first annuity ceased to be a voluntary grant.

There being arrears due on the first annuity, the promising not to sue for them, was a good consideration, and from that time it ceased to be a voluntary grant.

The bond can never be supported in any other light than a voluntary one, for it is recited to be given in consideration of Doctor *Young*'s being at a very great expence, when he was candidate for a seat in parliament.

I cannot consider this as a valuable consideration, for Doctor *Young* cannot be supposed to be a candidate for a seat in the House of Commons upon any other view but serving his country, and the part the Duke of *Wharton* took in the affair can be considered no otherwise than as a desire or request at most.

The expence a person was put to in standing for member of parliament, is not a valuable consideration to support a bond given for that purpose.

*The Doctor's annuities were by Lord Chancellor directed to be paid out of the money remaining in the hands of the trustees, and which arose from the sale of the trust-estates, so as not to disturb any payments that have been already made, and which are comprised in the schedule to the Master's report, that was confirmed in 1729.

[*155]

Kingsbire versus *Young*, March 16, 1740.

Case 137.

AN award was made a rule of the court of King's Bench according to a submission for that purpose, and an attachment has been granted for not obeying the award.

The court of King's Bench was the proper court to examine into the partiality of the arbitrators, as the award was made a rule of court there, which the plaintiff might have done by shewing cause why the rule for an attachment on the non-performance of the award should not be made absolute.

by of the arbitrators, as the award was made a rule of court there, which the plaintiff might have done by shewing cause why the rule for an attachment on the non-performance of the award should not be made absolute.

KAMPSHIRE V.
YOUNG.

The plaintiff here has brought a bill suggesting fraud and corruption in the arbitrators, and praying that the award may be set aside.

See Nicholas v. Roe
The defendant pleads the award in bar to the plaintiff's bill and insists it is a fair and just award.

5 Jurors
165. 8
Mr. J. H. 431.
Lord Chancellor said to the plaintiff's counsel, Why did you not proceed in the court of King's Bench, the proper court to examine into the partiality and corruption of arbitrators, which you might have done by shewing cause, why the rule for attachment on the non-performance of the award should not be made absolute.

I remember said his Lordship, but one instance in this court of a bill brought for this purpose, which was in the case of *John Ward* (1).

But as the answer of the defendant to this bill is very loose and general, and there is an express submission to amend any errors which the arbitrators may have made in respect to the mutual accounts delivered in to them by the parties: let the plea stand for an answer, with liberty to except.

(1) S. C. 2 *Ves.* 316. stated from *bell, Bunb.* 265. *Lingood v. Croucher* the Register's book. See also *Cbicot v. post.* 395. 501. *Metcalf v. Ives, and Lequejne*, 2 *Ves.* 315. *Alarides v. Camp-* 1 vol. 64. note 2.

Case 138.

Cottington versus Fletcher, the same Day.

The plaintiff, whilst a papist, assigned an advowson to the defendant for the term of 99 years, and having conformed has brought his bill for a re-assignment of the term, suggesting he had only assigned it in trust for himself, and to avoid the penalties of the statute of 3 *Jac.* 1. and 1 *W. & M.*

MR. *Cottington*, who was formerly a papist, while he was of the *Romish* persuasion, assigned an advowson to the defendant for the term of 99 years.

The defendant pleaded the statute of Frauds and Perjuries in bar to the discovery, but by his answer admitted that the advowson was assigned to him for the purposes charged by the bill.

Lord *Hardwicke* held the plea must be over-ruled, being coupled with an answer which admitted the facts (1).

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man. v. Whitley
Napell 423
Since his conformity to the protestant religion, he has brought a bill against the defendant for a re-assignment of the term, suggesting that he had only assigned it in trust for himself, and in order to avoid the penalties in the statute of 3 *Jac.* 1. cap. 4. sect. 1, &c. and 1 *W. & M.* c. 26 which vest the presentation of livings in the gift of papists in the two universities.

To this bill the defendant pleads the statute of Frauds and Perjuries in bar to the discovery, and says that there was no declaration of trust in writing, but by his answer admits that the advowson was assigned to him for the purposes charged by the bill, and that he never intended to take any benefit to himself, otherwise than in presenting the other defendant, Mr. *Loggin*, to

(1) *Crofton v. Bayne, Prec. Cha.* 208. *Potter v. Potter*, 1 *Ves.* 441. *Gunter v. Symonson v. Tweek, Prec. Cha.* 374. *Halscy, Amb.* 586. *Whitchurch v. Bevis, Attorney General v. Day*, 1 *Ves.* 221. 2 *Bro. Cha. Rep.* 559.

the

the church upon the next avoidance, for that he was recommended by Mr. *Loggin* to the plaintiff as a proper person for a grantee, and that he did not know the plaintiff above a month before the grant.

COTTINGTON
V. FLETCHER.

LORD CHANCELLOR,

I am of opinion that the plea ought to be over-ruled.

Undoubtedly, if the plea stood by itself, it might have been a sufficient plea, but coupled with the answer, which is a full admission of the facts, it must over-rule the plea.

If the admission and confession by the answer amounts to an admission and confession of a trust for the defendant *Loggin* as to the first avoidance, the consequence of this is a resulting trust for the plaintiff after the presentment to *Loggin* is performed.

And this is the case upon the statute of Frauds and Perjuries, where the admission of an express trust to one person, is likewise the admission of a resulting trust for another (1).

If the defendant had demurred to this part of the bill, it might have been of a different consideration.

For as this assignment was done in fraud of the law, and merely in order to evade the statute of 3 Jac. 1. ch. 5. and 1 Will. & Mar. ch. 26.

Lord Hardwicke was inclined to think if the defendant had demurred to this absolute against

part of the bill, such a fraudulent conveyance would, at the hearing, have been made the grantor.

I doubt at the hearing whether the plaintiff could be relieved, such fraudulent conveyances being made absolute against the grantor.

The act of 12 Anne, stat. 2. ch. 14. does not, in the case of a papist, make the whole trust void, but only the turn upon an avoidance, which is vested in the universities; in the present case the plaintiff conformed before there was any avoidance, and consequently there was nothing vested in the universities.

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The act of 12 Anne does not in the case of a papist make the whole trust void, but only the turn upon an avoidance which is vested in the universities.

The acts of papists are purged upon their conformity to the protestant religion, and are freed and discharged from any penalties and losses which they might otherwise sustain in respect of their recusancy. Vide 1 Jac. 1. c. 4. sect. 2, 3.

Papists, on their conformity, are freed from any penalties they might otherwise sustain in respect of their recusancy.

(1) *Loyd v. Spillet*, ante 150.

Abraham versus Dodgson, the same Day.

Case 139.

A Bill was brought for a discovery.

The defendant answered to part, and demurred to part of the discovery.

When a defendant has answered to a discovery prayed by a bill, he cannot afterwards demur to it.

LORD CHANCELLOR,

The demurrer must be over-ruled, for it is an absurdity after the defendant has answered to the discovery, that he should

Though you answer to the discovery, yet you may demur to the relief.

ABRAHAM V. DODGSON. afterwards demur; you may indeed answer to a bill of discharge, very, and demur to the relief, but that is quite different from what the defendant has done in the present case (1).

(1) See *Fry v. Penn*, 2 Bro. Cha. Rep. 230. *Price v. James*, 2 Bro. Cha. Rep. 319.

Case 140. *More versus More*, April 6, 1741, came before the Court on Petition.
Mr. L. Waller's Case.
Supra M. 639.

S. C. Barn. Cha. Rep. 404. Several persons appeared to answer the contempt in marrying Miss *More*, a ward of this court, to one *John Peck*.

MR. Charles, a clergyman of *Harrow on the Hill*, who married Miss *Sophia More*, a ward of this court, without leave, to one *John Peck*; and Mr. *Ubank* and others, who were present when she was married, appeared also, to answer the contempt of this court.

LORD CHANCELLOR,

No case calls more for the interposition of the Legislature than this.

These are mischiefs that want the correction and reformation of the Legislature as much as any case whatever, and I believe it will very shortly come under the consideration of parliament (1).

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Lord Hardwicke said, the giving away a woman at her marriage, as the father, though not an essential thing, yet is a ceremony always required, and therefore committed the person who did it.

John Ubank must in the first place stand committed, who assisted in conducting Miss *More* out of her guardian's house, and gave her away at the wedding.

The giving away a woman at the time of her marriage, as the father, though it is not an essential thing, yet it is a custom or ceremony which clergymen always require, and consequently call for at the time.

To make persons liable to a contempt, they must be concerned in the original contrivance, and be apprized of her being a ward of the court.

Indeed it is not barely having some hand in the transaction of the marriage which will make persons liable to the censure of the court, but they must appear to have been concerned in the original contrivance of the marriage, and to have been apprized of the infant's being a ward of this court, which Mr. *Ubank* is proved to have been, and not denied by affidavits on his part.

Mr. Charles, the clergyman, who married Miss *More* to *Peck*, comes next under consideration.

The canons which have not the authority of an act of parliament are not binding on laymen.

It is very surprising, when canons, with respect to marriages, have laid down directions so plainly for the conduct of ecclesiastical officers and clergymen (which, though they have not the authority of an act of parliament, and consequently are not binding upon laymen, yet certainly are prescriptions to the ecclesiastical courts, and likewise to clergymen) that there should be such frequent instances of their departing from them, and introducing a practice entirely repugnant to them. V. 62.

(1) See stat. 25 Geo. 2. c. 33.

Can.

Can. 102, &c. in 1603. all of them extremely plain in their directions to ecclesiastical officers and clergymen: one would think no body ever read them, neither the officers of the spiritual courts nor clergymen, or they could not act so diametrically opposite to them.

MORR V.
MORR.

Proctors sometimes stand at the door of the commons, and solicit persons to take out licences, just in the same manner as the runners to Fleet parsons do, which is not a very reputable behaviour in them.

Three parishes are put into the licences by the officer of the spiritual court.

I should imagine that this is done in order to comply with the canon, by mentioning the parishes where the man and woman inhabit, and probably naming the third may be only upon a supposition that the persons may have a house both in town and country, and therefore left to their option to marry in either.

* No ecclesiastical person can dispense with a canon, for they are obliged to pursue the directions in them with the utmost exactness, and it is in the power of the crown to do it only.

The canons must be pursued with the utmost exactness by ecclesiastical

persons, and a clergyman who presumes to marry a person out of the parishes in which the man and woman reside, is liable to penalties.

What Mr. Charles swears, I believe is true, that it is very [* 159] frequent for surrogates to fill up the blanks in licences with the name of any other parish, and this in some measure may justify him, as it is the common method among clergymen; but then this will not excuse with regard to penalties in the canon, which expressly direct that no clergyman shall presume to marry a person out of the parishes in which the man and woman reside.

Upon the whole, as I said in the case of the other person, Mr. Charles does not seem to me to have been at all concerned in the contrivance or design of doing this wrongful act, and therefore is not guilty of a contempt of the court; but I would recommend it to him to be more cautious for the future.

The clergyman not appearing to be concerned in the contrivance of this wrongful act, is not guilty of a contempt of the court.

However, I will not part with the licence, but will order it to be left in the register's hands, that, if there should be occasion, the petitioner may apply to him for it.

The licence ordered to be left in the register's hands, that the petitioner might

have recourse to it, in occasion.

Smith versus The Duke of Chandos, upon Exceptions, April 9, Case 141.
1741.

LORD CHANCELLOR: Though this court have gone a good way in supporting a book of accounts which relates to a partnership, yet I do not know any instance where they supported *items* in such a book, that relate to the particular interest of the officer, deputed by the partners to keep this general book of account, separate from the partnership affairs.

Items in a partnership account relating to the particular interest of a book-keeper, will not be supported in this court.

Barnard. Chanc.
412.

Case 142. *Waite versus Whorewood, on Exceptions, April 10, 1741.*

If an executor, for the benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but you may still follow it, as much as if it had continued in the same condition as at the testator's death.

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IF an executor changes and alters the nature of a testator's estate, it has been insisted that this is a conversion by the executor, and that, as money has no ear-mark, you cannot follow it (1), but the executor by such transactions has made himself liable to a *devastavit*: now in general this rule is right; but if an executor, for the benefit of the testator's estate, should invest part of it in the funds, or should transfer the money from one particular stock, and invest them in another, this* is not a conversion or appropriation by the executor of a testator's estate, but you may still follow it, as much as if it had continued in the same plight or condition as it stood in at the death of the testator; for, in the nature of the thing itself, the executor could do no otherwise, where a testator's estate is standing out in the funds, for of course they will require to be varied and changed according to the circumstances of things (2).

(1) See *Ryall v. Ryall*, ante 1 vol. *Worsley v. Earl of Scarborough*, post. 3 vol. 392.

(2) See *Harrison v. Harrison*, ante 121.

Case 143. *Heron versus Heron, April 18, 1741 (1).*

S. C. Barn. Cha. Rep. 450.

A freeman of London taking the advantage of his son's necessities, in consideration of a bond for securing the

son an annuity of 50*l.* prevails on him to release the share he had in the orphanage part; the father also prevailed on another of his sons, to give him a release of his share of the orphanage part, in consideration of an annuity of the same nature: but there were not the same proofs of his being forced into the release, and the father had at times advanced him 3 or 400*l.* Lord Hardwicke held, the plaintiff being turned out of doors, left destitute, and void of maintenance, a release extorted cannot be supported.

Lord Hardwicke was also of opinion, the other son was equally intitled to be relieved.

By the custom of London the orphanage part must go in equal shares, and if the father turns the money into any other thing, which he thinks may take it out of the custom, yet the court has relieved the children.

A Father taking the advantage of his son's necessities, to which he was reduced by his unkind usage, prevails upon him (in consideration of a bond for securing to the son an annuity of 50*l.* per ann.) to give a release of the share he might be intitled to in the orphanage part of his father's estate, who was a freeman of the city of London.

The father likewise prevails upon another of his sons to give him a release (in consideration of an annuity of the same nature) of his share of the orphanage part; and at the foot of the release the son is bound in the penalty of 8000*l.* not to make any claim hereafter to his orphanage share, but there are not the same proofs of this son's being forced into the release, for the sake of maintenance or mere necessity, and it appeared in evidence too, that his father in his life-time had advanced him with small sums to the amount of 3 or 400*l.*

LORD CHANCELLOR,

(1) *Reg. Lib. A.* 1740. fol. 535.

There

There is no doubt, by the general rule of the law of the land, but a father may judge of the merits of his children, and may dispose of his estate in such shares and proportions amongst them as he thinks proper.

HERON v.
HERON.

Wallace v. Hall
2 (D. W. & W. 6.
452.

But the custom of *London* has laid a restriction as to a freeman's personal estate, that the orphanage part shall go in equal shares among the children, and he cannot deprive them of it; this has produced certain rules in this court which have long prevailed, to prevent any evasion by a father of the custom; and therefore if the father turns his money into any other shape, and which he thinks may take it out of the custom, yet the court has relieved the children (1).

Hoghton v. Hog
15 Beau. 27.

Notwithstanding this, a father may, by laying out his personal estate in land, take it out of the custom, which is latitude enough, and a sufficient power over the customary estate (2).

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The city of *London* goes upon this consideration, that as a father in the way of trade has great occasion for the personal estate, it would be prejudicial, even to the father himself, to alter the nature of it.

As it is the intent of the custom, that the children of a freeman, by means of it, may either be advanced in marriage, or put out in the world by way of trade, there is no doubt but agreements for such purposes between a freeman and his children will be supported in equity. *Vid. The case of Metcalf and Ives, June 18, 1737. 1 T. Atk. 63.*

Consider then if the present is in any respect like these cases. I think clearly it is not; I speak as to the plaintiff in this cause.

Whether the children, by acts of disobedience, or any other misbehaviour, had merited this usage from the father, I cannot enter into, nor is it of any weight in the present consideration.

The plaintiff was turned out of doors, left entirely destitute, and void of a maintenance, therefore it is impossible to support a release extorted from a son under such circumstances.

Suppose the plaintiff had been intitled to a tenancy in tail of real estate, and the father, a bare tenant for life, had taken such an advantage of his son's necessities, to draw him in to join in any conveyance which would destroy his remainder, this court upon very slender evidence of such a practice in a father, has relieved the son (3).

Where a father, tenant for life, draws in a son, tenant in tail, to join in a conveyance which would destroy his remainder, this

court, on slender evidence, will relieve the son.

The rule of this court is, that if the father leaves no wife (and some of the children are barred by any agreement between the father and them) the child who is not barred must take the whole of the orphanage share, and the father shall not have the advantage of the other children's being excluded from their shares in the orphanage part.

(1) *Vide Smith v. Fellowes, ante 62. post. 377.*

(2) *Vide Ambrose v. Ambrose, 1 P. W. 321. Turner v. Jennings, 2 Vern. 612. Hall v. Hall, 2 Vern. 277.*

(3) See *Cory v. Cory, 1 Ves. 19. Tendril v. Smith, ante 85. Young v. Peachy, post. 254. Kinchant v. Kinchant, 1 Bro. Cha. Rep. 369. 374.*

HERON v. HERON.
If a father, merely for the sake of maintenance, and not for advancement in marriage or trade obliges his son to release his right to the orphanage share, such release is absolutely void.

I take it to be the rule of the custom of *London*, that if ther will oblige a son merely for the sake of maintenance, not for advancement in marriage or trade, to release his right to the orphanage share, that such release is absolutely void; father, by the laws of nature, is obliged to maintain his children, and such an attempt in a father is a plain fraud upon custom (1).

[162] Therefore, not only the plaintiff, but the other son, was one of the defendants, though he does appear by any evidence to have been under the same difficulties with the plaintiff shall be equally relieved.

The executors under the will of the father, have each given them for their trouble in looking after the estate question in respect to them was, whether they should abate proportion with the rest of the legatees, the personal estate being deficient to answer the whole.

Lord *Hardwicke* inclined they should; but Mr. Attorney General insisting, there was a case lately determined at the law, that the executor should not abate in proportion with the legatees; the counsel for the executors were at liberty to look for cases, and to mention it another day (2).

(1) *Morris v. Burroughs*, ante 1 vol. (2) See post. 171. S. C. 399. 403.

Case 144.

Ex parte Angel, 14, 1741.

S. C. Barn. Chancery. Rep. 423.
Where some of the undertakers under the act of 4 Ann. c. 14. in regard to briefs, are dead, in a bill for an account, their representatives need not be brought before the court, for they are each answerable, the one for the other.

IN 1731 a very dreadful fire happened at *Blandford* in *Dorsetshire*, and very soon after the fire, great contributions voluntarily made in the counties of *Dorset* and *Somerset*, on behalf of the sufferers. In 1732 a brief issued on behalf of the sufferers; in the same year 11,500 printed briefs delivered by the sufferers to the undertakers, who had been appointed according to the statute of 4 Ann. c. 14. one *Stanley* agent for the undertakers, in receiving all the money from them which they used to send to the sufferers, and in paying money to the sufferers; and in *London* he was a general agent negotiating the whole affair relating to the briefs: the number of undertakers were at first seventeen, the major part of them lived at *Stafford*, kept an office there, and likewise the office at which the act of parliament in the 2d sect. directs, wherein returns are to be made of the number of printed briefs they received of the times when those briefs are signed, and sent away what parishes and places, and the time of receiving the briefs back, and the money collected thereon, and the said printed briefs so received back, are to be deposited and left with the register of the court of chancery.

Soon after the undertakers received the briefs, they circulated them throughout the kingdom, and shortly after they had

, they received directions from the sufferers not to send briefs into the counties of *Dorset* and *Somerſet*, but thoſe came too late.

Ex parte
ANGEL.

: *Eaſter* 1733 the undertakers had received from collections had been made by the briefs 6077*l.* on the 8th of *February* wing, they ſent to Mr. *Stanley* 4000*l.* on behalf of the ſufferers, who paid the money to them accordingly: the undertakers made no other payment till the 3d of *July* 1735, and then paid the ſufferers a further ſum of 3000*l.* by the 8th of *ſt* they had received in the whole 7914*l.* 7*s.* 7*d.* and on that they made a further payment of 500*l.*

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the 10th of *March* 1740 a petition was preferred to this, on behalf of the ſufferers, againſt the undertakers, and againſt *Stanley*, complaining amongſt other things, that undertakers had not depoſited with the regiſter of the court of the briefs, according to the direction of the act of parliament; and that by the negligence of the undertakers, a great number of the briefs were never returned, and that they had not accounted.

After filing of this petition, the undertakers brought before the regiſter, and depoſited with him, 10845 briefs, and ſaid they had 73 in hand ready to be delivered, ſo that 582 were returned at all; and even of thoſe that were returned, 629 no money marked upon them.

It was ſworn, on the behalf of the undertakers, that there are ſtill a great number of briefs that are never returned; but it appeared that there was never ſo great a number miſſing as in the preſent caſe.

At the time this petition was preferred ſeven of the undertakers out of the ſeventeen were dead, and it was ſubmitted on behalf of the ſurvivors, that the representatives of the undertakers that were dead ought to be brought before the court.

LORD CHANCELLOR,

I am of opinion that it was not neceſſary to bring theſe representatives before the court, and that an order for accounting is to be made againſt the ſurvivors; I do not at all like the behaviour of theſe undertakers in what they have done.

The undertakers are to be conſidered as one body, and they each of them anſwerable the one for the other, for which the objection for want of bringing the representatives of the dead undertakers before the court is quite immaterial.

It has been ſaid on the part of Mr. *Stanley*, that he at leaſt is not to be blamed in the preſent tranſaction, for that he was only an agent for the undertakers, in receiving and paying money to the ſufferers.

It is ſaid Mr. *Stanley* ought not to be conſidered in ſo confined a manner, for he was generally intruſted with the management of briefs in *London*; conſider then how this matter ſtands with reſpect to the defendants.

At *Eaſter* 1733 the undertakers had received 6077*l.* on the 8th of *February* following they only paid 4000*l.* part of that money,

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money, and kept the rest of it in their hands till the 3d of July 1735; then, indeed, they made another payment of 3000*l.* by the 8th of August 1736 they had received in the whole 7914*l.* 7*s.* 7*d.* and on that day it is they only make a further payment of 500*l.* there is no great weight indeed to be laid upon this latter circumstance, but on the former there is a strong foundation for charging the undertakers with malpractice.

There are two methods which the statute of Queen Ann. prescribes, in order to provide for the undertakers acting fairly; one, that a book be kept by them, wherein entries are to be made of the number of the printed briefs they receive, of the times when the briefs were signed and sent away, to what parishes and places, the times of the receiving the same back, and the money thereon collected; this book the managers had kept at *Stafford*, and perhaps that may not be an improper place, as that town is about the center of the kingdom: however, it was proper that they should have had a duplicate of this book in *London*, where the general resort of people is, for the act directs that all persons shall have free access to it.

The other method which the act prescribes is, that the undertakers should deposit the briefs with the register of this court after they are returned to them; and yet, till the petition was actually preferred not one brief was left with the register.

This is a very extraordinary neglect in the undertakers, for the words of the act are, *sect.* 2. "That if the whole number of printed copies of such briefs, so received of the printer, shall not be duly returned, as is hereby required, the undertaker or undertakers shall, for every printed copy which shall be found wanting, and not returned as aforesaid, by default of them or their agents, forfeit the sum of 50*l.* unless he or they shall make sufficient proof, to the satisfaction of the court of Chancery, of the said briefs so wanting being lost or destroyed by inevitable accident, and of what money was really and truly collected thereon, and fully account for and pay the same."

In this act there is another clause, *sect.* 4. and that relates to the manner of accounting.

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The words of that clause are, "That the said undertaker or undertakers shall, within two months after the monies respectively received, and after due notice thereof to the sufferers (who are to be admitted to controvert the same, account before one of the Masters of the court of Chancery to be for that purpose appointed by the Lord Chancellor, Lord Keeper, or Commissioners for the custody of the great seal of *England*, for the time being, for all the money by them received on account of such letters patents and process, and shall produce before him an exact account of the respective printed briefs by them delivered out, and received back, as left with the Register as aforesaid, and thereupon the said Master shall proceed to make his report of what shall be found

"d

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on such account; and the report, being confirmed by the court of Chancery as usual, shall be a charge on the said undertaker or undertakers, and shall be carried into execution against him or them, as if decreed in a suit there depending."

In respect of the number of briefs which the undertakers at last returned, they have only left with the Register ten and eight hundred and forty-five; they say, indeed, they seventy-three more, ready to be produced; but even when these are deducted, there are five hundred and eighty-two which are unaccounted for, and of those which are produced, there are six hundred and twenty-nine, which have no money marked on them at all.

The loss of eight hundred and eighty-two briefs is a very great one, and though the affidavits made on the part of the undertakers do set forth, that there are always a great number of briefs which never come back to their hands, yet they do not need to say, that ever the number was so great as in the present case.

In order to account for this great number of briefs that are missing, it has been said, that, very soon after the fire, the undertakers received great collections from the counties of *Dorset* and *Somerset*, and upon that account the sufferers sent directions to the undertakers, that they should not circulate briefs in those counties, but those directions came too late, and that is one reason why many of the briefs were never returned to the undertakers.

And it is indeed true, that this reason may account for a great part of the 629 briefs, whereof no money is marked; but it does not seem to account for the 582.

Therefore, his Lordship was pleased to order the undertakers *Stanley* to account accordingly.

Gurish versus Donovan, April 14, 1741.

THE plaintiff brought his bill against the defendant, and by that bill prayed relief, as well as a discovery: he likewise proceeded at law in an action against the defendant, on the same account; upon this an application was made to the court, that the plaintiff should make his election in which court he would proceed; thereupon he elected to proceed at law, but was allowed to proceed in this court likewise, with regard to so much of his bill as sought a discovery, and amended his bill on payment of costs, by striking out that part of it which tended to relief.

He was dismissed of course, as praying nothing but a discovery, and the costs of the dismissal were paid by the defendant at 38*l*. The plaintiff recovered judgment against the defendant in damages and the amount of 440*l*. and petitions to set off the costs at law against the costs here. *Lord Hardwicke is reasonable, and if the precedents (which he ordered to be searched) would justify him, said, he would grant the petition.*

[166] *Waigh*
Cafe 145.

S. C. Barn. Cha. Rep. 428. *Mud.*
A bill here praying relief as well as a discovery, whilst the plaintiff was proceeding at law on the same account, he amended by striking out the part which prayed relief, and the bill there-
1 S. C. 266

GURISH v.
DENOVAN.

The bill was thereupon dismissed of course, by reason it pr nothing but a discovery; the costs of the dismissal were t to the defendant at 38/.

The plaintiff recovered judgment against the defendant in action at law, and the damages, together with the costs, am to 440/.

For those damages and costs at law the defendant was t in execution, and now lies in custody; but notwithstanding has thought proper to take out an attachment against the p tiff for the costs in this court.

A petition is thereupon preferred to the Court on beh: the plaintiff, praying that he might deduct the costs, whic had incurred in this court, out of the costs and damages w he had recovered against the defendant at law.

Lord Chancellor said, the petition seemed to him to be reasonable; and if the precedents of the court would j him in granting it, he would certainly do it; but he do whether the practice of the court would allow of it, by r that the bill of discovery had been dismissed out of court Lordship said, he would not make any order on this peti but directed it to stand over, that the plaintiff might sear precedents.

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Lady Coddington versus England, April 18, 1741.

Cafe 146.

S. C. Barnard.
Chanc. Rep. 436.

A N issue had been directed in this court to try a c set up by the plaintiff, who was a land-holder in a j in Gloucestershire, whether she had a right of inclosing, e five of all right of common in the house-holders, which tried at Gloucester, at the last summer assizes, and a v found for the custom; it comes now before this court the equity reserved, as to costs against the defendant in court.

Where a plaintiff on a bill to perpetuate the testimony of witnesses, has examined, and thereby had the fruit of her bill, neither herself, nor the defendant, are intitled to costs.

If this had been barely a bill to perpetuate the testimony the witnesses to the custom, and the plaintiff had gone t examination of her witnesses, and had had the fruit of her I should not have thought either the plaintiff or the dese intitled to costs in this court.

When a multiplicity of actions have been brought where the custom might have been tried in one, it is such a vexation, that the plaintiff shall have the costs both in law and equity.

But the plaintiff, in this case, was under a necessity coming into this court for relief, against the vexation of tl fendants, who had brought a multiplicity of actions, no less eight, four at one time, and four at another, when the c might have been tried at once, and in one action: I mul cree, therefore, that the custom found by the verdict be blished, and that the plaintiff be quieted in the enjoyment possession of her inclosures, and that the defendant do p plaintiff her costs, both in law and equity (1).

nders, remainder to the first and every other son of the of his said sister, remainder to the use of the heirs female is said sister; and for default of such issue, to *Thomas* Esq. for his life, and from and after his decease, to the *Sidney Beauclerk*, for his life, remainder to trustees during *Sidney's* life, to preserve contingent uses, remainder to the son of Lord *Sidney's* body, and the heirs male of the body ch first son, with like remainder to every other son of Lord y's body, and several remainders over: and as to his lease-estate, he desired that it might go to the same persons, and he same estates, as his freehold is limited, as far as by law ay: and makes *Arabella Reeve*, Lord Chief Justice *Reeve*, Doctor *Mead*, his executors: the surplusage of his personal e he desired might be laid out in the purchase of lands of rance, to be settled to the same uses as his freehold lands bove settled.

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y a codicil, dated the 19th of *June*, 1730, he gave to the tiff, Lord *Sidney*, an annuity or rent-charge of 100*l.* per to commence from and immediately after the testator's h, until the estate limited to him and the heirs males of his ; shall come to be possessed by him, to be paid quarterly, ch annuity shall be issuing out of the testator's freehold lands, reof the remainder is limited to the said plaintiff, and the s of his body, and reciting that he had by his will, after the ase of his sister, *Arabella Reeve*, and in default of issue male female from her body, devised all his freehold and copyhold is, manors, &c. lying in the borough of *New Windsor*, &c. *Thomas Reeve*, Esq. during his natural life, he says, now my l is, that in case the said *Thomas Reeve* and the said Lord ey *Beauclerk* shall survive the said *Arabella Reeve*, that then

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for and during his natural life, the testator's will is, and he thereby devises, limits, and appoints, that the annual profits of the same shall, from and immediately after the decease of his said sister, be equally divided between the said *Thomas Reeve* and Lord *Sidney Beauclerk*, share and share alike, during their joint lives; and his will is, that the annuity or yearly rent-charge of 100*l. per ann.* be taken and accounted as part of his dividend of the said annual profits of the said lands, tenements, and hereditaments.

The will and codicil was proved by *Thomas Reeve*, alone, in his life-time, and there was a surplus of Mr. *Topham's* personal estate, consisting of 2000*l.* Bank stock, and about 3500*l.* upon a mortgage, in the names of *Richard Topham* and *Thomas Reeve*, which stock and money on mortgage continued till after the death of Lord Chief Justice *Reeve*, who died the 16th of January, 1736, and made his will, and thereof the defendant *James Mead* and *Pearce* executors, and received the dividend and interest of the said stock and mortgage during his life from and after the death of the said *Arabella Reeve*: and after his death the defendant, Doctor *Mead*, as surviving executor of *Topham's* will, proved the same, and became possessed of the said Bank stock, and received the money due upon the mortgage.

Richard Topham died in September, 1730, and *Arabella Reeve* died the 20th of September, 1732.

This cause was heard upon bill and answer; and the only question in it was, Whether the plaintiff, Lord *Sidney Beauclerk* was intitled to a moiety of the interest and profits of the surplusage of *Topham's* personal estate, during the life-time of the Lord Chief Justice *Reeve*, and from and after the death of *Arabella Reeve*.

LORD CHANCELLOR,

To judge of the words, and likewise of the intention of the testator, it is necessary that the will and codicil should be taken together; and it is observable, in the first place, that all the charges in this will relate merely to the freehold and copyhold lands.

If considered merely upon the words, and taken abstractedly without any regard to the design or intention of the testator, there is no colour in the world to say that they can extend to make any disposition of the profits and produce arising out of the surplusage of his personal estate.

For the rest and residue of his lands, tenements, and hereditaments, can never mean any thing more than the rest of the real estate of Mr. *Topham*.

But then it has been insisted on for the plaintiff, that the words of the will are not to carry much weight in the consideration of the court, but the will must be construed in conformity to the intention of the testator, which appears pretty plainly to have been, that Lord Chief Justice *Reeve* and Lord *Sidney*, after the death of *Arabella Reeve* should take in moieties.

And that if a man makes a will, and disposes of lands, that such devise will pass, not only what the law will pass, but what equity

passes likewise, which is money directed to be laid out in
1).

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v. MEAD.

I am of opinion this construction can never prevail with-
outmost force and torture of the words.

Now that the rule laid down by the bar, that money di-
rected to be invested in land, must be considered as land, is
right, but then it is truly said the will must be compleat,
ambulatory till the testator's death (2), nor till then can
be considered as land; for would not his personal estate have
been subject to all intents and purposes to his debts, supposing
there had been any, notwithstanding the devise that the surplus
be invested in land.

Now Mr. *Topham* had given, by his codicil, all his lands
under his person, and his heirs, can any body doubt whether
he could not have made a total variation as to the devisees un-
der the will?

As much for the words, next for the intention of the

testator it is very far from being clear to me that it was his in-
tention that the interest and produce of the surplussage of the
personal estate during the joint lives of Lord Chief Justice
and Lord *Sidney*, should go in moieties to them in the same
manner with the rents and profits of the real estate; but
it may be doubtful what his intention was in this re-
spect and then it will come to this question, whether he has
used proper words to manifest such intention, and if he has not,
it must take place.

Now in the codicil he begins with a recital of the words of
the will, that he had devised all his freehold and copyhold lands,
with the rents, tenements, and hereditaments, &c. that he
did not likewise take notice of the money directed to be
invested in land and settled to the same uses, is very extraordinary,
and it is to be his intention, as the plaintiff's counsel con-
tends that the interest and produce of it should go in moieties
out in land.

Now words *rest and residue* must be taken by all the rules of
equity, as well as law, to relate to something that went be-
fore; and it is absurd to say, that this part of *Topham's* estate,
which is now in question in the cause, should be equally af-
fected whether the testator calls it by the name of his personal
or real estate.

And too, when the testator in the codicil says, that the
yearly rent-charge of 400*l. per ann.* above granted
to Lord *Sidney Beauclerk*, shall be taken and accounted as part
of the dividend of the said annual profits of the said lands, tene-
ments and hereditaments, how can it have been imagined that
the testator would have with so much nicety and care provided

See *Green v. Smith*, ante 1 vol. (1) See 2 *Ves.* 51. *Grayson v. Atkin-*
Guidot v. Guidot, post. 3 vol. 254. *son*, 1 *Wils.* 333, 334. *Roe v. Harvey*,
5 *Burr.* 2638. *Tilley v. Simpson*, 2 *Durn.*
40, *Litt.* 112. b. *Duke of Marl-* 5 *East* 659. note. *Ridout v. Pain*, post.
vs. Lord Godolphin, 2 *Ves.* 61. 77. 3 vol. 485. and note.

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against Lord Sidney's incumbring the real estate by his demand on account of the rent-charge, when Lord Chief Justice *Rex* might so easily have satisfied the annuity out of the interest and produce of the surplusage of the personal estate, if it had been *Topham's* intention, this should likewise have gone in moieties. *The bill dismissed.*

Case 148.

April 24, 1741.

S. C. ante 160.
Where a legacy is given to an executor generally, or for his care and pains, it makes no difference; for if there is a deficiency of assets, he must abate in proportion with other legatees.

IN the cause of *Heron* versus *Heron*, which came on again to day, the *Attorney General* mentioned to the court the case of *Newton* versus *Haughton*, heard at the *Rolls*, October 31, 1734, to shew that the executors of *Heron* ought to retain the legacies of 100*l.* and not to abate in proportion with the rest of the legatees.

LORD CHANCELLOR,

The case of the *Attorney General* versus *Robins*, 2 *Wms.* 23. is directly contrary to this resolution, and determined so by the very same Judge, Sir *Joseph Jekyll*, about twelve years before the case of *Newton* versus *Haughton*.

There is another case in 2 *Vern.* 434. called *Fretwell* versus *Stacy*, which is also differently determined: "a legacy given to executors for care and pains; if a deficiency of assets, the must abate in proportion with the other legatees."

I must own these two last fall in with my own opinion much more than the latter case.

For where legacies are given to executors for their care and pains, I am very unwilling to distinguish them from common legatees; because where the words *care and pains* are expressed in the will, or whether it is given generally without these words it intirely depends upon the whim of the drawer of the will, and is still but a legacy, and not more so than any other, and therefore there ought not to be such a distinction as Mr. *Attorney General* contends for upon such slight grounds.

Besides, it would be attended with great inconveniences therefore let the executors abate in proportion with the rest of the legatees.

* In the case of the *Attorney General* versus *Robins*, it was urged the 60*l.* given the executors being said to be for their care and pains, the same became a debt: as the executors, *virtute officii*, being intitled to a preference, might pay such their own debt first.

Sed per cur. The executors, if they please, may renounce; and the legacies then are but legacies, and shall abate in proportion: it cannot be a debt, in regard that can never be a debt to the executors, that was not so to the testator 2 *Wms.* 25.

Bainton and others versus Ward, April 24, 1741.

Case 149.

GEORGE Ward having a power to charge *Isabella*, his wife's estate with a sum not exceeding 2000 *l.* and having by his will devised 500 *l.* a-piece to his two sisters, and dying in debt to the plaintiffs.

S. G. cited
2 Vef. 2.
G. W. having a
power to charge
his estate with
2000*l.* by his

will gives 500 *l.* a-piece to his two sisters, and dies in debt to the plaintiffs: considered as the personal estate of *G. W.* and subject to his debts.

The question was, Whether that appointment to the two sisters should be good to defeat the creditors from having satisfaction out of the 2000 *l.* as part of *George Ward's* personal estate.

Mr. Brown, for the plaintiff, cited *Lassells versus Cornwallis*, 2 *Vern.* 465. and *Shirley versus Ferrers*, the 3d or 4th cause before Lord *Talbot*.

This power was given by a settlement after the marriage of *George Ward*, as follows: "provided always, and it is hereby further declared, by and between the parties to these presents, that *George Ward* shall, by appointing two trustees under any deed in his life-time, or by his will at his death, charge all the wife's estate with a sum not exceeding 2000."

LORD CHANCELLOR,

I am of opinion that this ought to be considered as the personal estate of *George Ward*; where there is a general power given or reserved to a person for such uses, intents, and purposes as he shall appoint, this makes it his absolute estate, and gives him such a dominion over it, as will subject it to his debts (1).

For it would be a strange thing, if volunteers, as the legatees are, should run away with the whole, and that creditors for a valuable consideration should sit down by the loss without any relief in this court.

The case of *Shirley versus Lord Ferrers* is directly in point.

This money was not settled at all, but absolutely in the power of *George Ward*, and consequently there can be no doubt but his creditors must have the benefit of it.

Supposing a man has a power to dispose, by appointment, of a reversion in fee, and makes no disposition of it, yet it shall be affects to satisfy specialty creditors (2).

If a power to
dispose by ap-
pointment of a
reversion in fee.
be not made use of, yet it shall be affects.

(1) So *Thompson v. Towne*, *Prec. Cha.* 52. 2 *Vern.* 319. S. C. *Lassells v. Lord Cornwallis*, *Prec. Cha.* 232. 2 *Vern.* 465. S. C. *Ashfield v. Ashfield*, 2 *Vern.* 287. *Hunt v. Toye*, ante 1 vol. 465. *Townsend v. Windham*, 2 *Vef.* 1. *Pack v. Bainton*, post. 3 vol. 269. *White v.*

Sanfom, *ibid.* 410. *Troughton v. Troughton*, *ibid.* 656.

(2) His Lordship directed the personal estate to be first applied towards payment of the debts, then the real estate descended, and then the 2000 *l.* *Reg. Lib. A.* 1740. fol. 613.

Case 150.

April 24, 1741.

Serjeant coun-
ters who have
been guilty of
mal-practices,
by the stat. of
Westm. shall not
be allowed to be
heard any more
in the way of the
profession.

2^d L. Walth. legs
se. 2. Resp. c
2^d line. 3. 29.

MR. Justice *Mitchell* this day by petition prayed to be charged out of the custody of the *Fleet*, as a clo-
soner within the walls thereof: he was committed for be-
principal contriver in marrying Miss *Hughes*, a ward of
court, a fortune of thirty thousand pounds, to a schoolma-
Issington, one *Science*, by trade a watchmaker.

There were several aggravating circumstances in this
and upon the whole the most flagrant contempt of the
that ever appeared before it, which was the reason of
Chancellor's setting a mark upon him, by making it part
order of commitment, that *Mitchell* as well as *Science* sho-
kept close prisoners within the walls of the *Fleet* at the
the warden.

In pursuance of this order *Mitchell* had been a close pri-
about five weeks, and now by affidavits sets forth the de-
able condition of himself and family from the unwholesome
of the prison, the illness of his son and wife from their con-
attendance upon him, his own ill state of health, and
other circumstances, and submits to make any reparation
relations of the Lady which the court shall direct, submit
wise to be restrained from acting as a counsel: the *superse-*
discharge him from the commission of the peace issued some
before this application.

The counsel for Mr. *Hughes* the uncle of the young La-
very much opposing it, my Lord Chancellor made an order
his discharge upon his attorney's undertaking to pay the ex-
pence of the former petition against him by the uncle
Hughes, and all other proceedings in consequence of it
tition.

But as to Mr. *Mitchell's* submission to be restrained from
ing as a barrister, I shall at present, said Lord Chancellor
no other directions but that according to his own submission
shall be restrained from acting as such till further orders.

Because, from any inquiries that I have hitherto made
am not satisfied what is the proper course to remove him
practising as a barrister.

Where a solicitor
is guilty of mal-
practices, he may
be degraded by
applying to strike
him out of the
roll of solicitors.

If Mr. *Mitchell* had continued a solicitor, there had been
difficulty, for the ready and proper way would have been
have struck him out of the roll of solicitors: and surely it
be very hard when he has advanced himself to a degree
greater rank and honour in the law, that there should be
some precedents for degrading a person who by his mal-
tices and misbehaviour has rendered himself highly unwor-
thy the character he has taken upon him of a barrister at law.

But whether this ought to be done by disbarring him
whether the court by its own power and authority will
him for the future, I shall not at present determine: but

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dreadly mentioned it to Lord Chief Justice *Lee*, who will assist me in finding out precedents in such cases (1).

The statute of *Westm.* 1. c. 29. says, that attorneys and serjeant counters who have been guilty of any male practices, and have acted unbecoming their profession, may be silenced, and not be allowed to be heard any more in the way of the profession.

My Lord *Coke* in his 2d *Institute & Exposition*, upon *Westm.* prim. c. 29. page 214. is clearly of opinion, that apprentices at law, which is another name for barristers, are included under the head of serjeant counters.

But however I will make no other order at present than what I mentioned before (2).

N. B. *Science* the husband was still left in custody.

(1) See the case of *Maurice Savage*, and prohibited from practising at the Bar. *Dugl.* 355. *Ed.* 2nd. Per Lord *Hardwicke* in *Butler v. Freeman*, *Amb.* 304.

(2) *Mitchell* was afterwards struck out of the Commission as Justice of the Peace,

Garth versus Ward, April 25, 1741.

Case 151.

A Bill was brought by three devisees against the heir at law of the testator, to perpetuate the testimony of witnesses, and to establish the will.

S. C. Barn. Cha. Rep. 450.
An heir at law is as much at liberty to invalidate the will, as the devisees to establish it; and such a suit is to all intents a *lis pendens* (1).

It was filed in *May* 1736. *Willis*, one of the defendants in the present cause, purchased the third of the estate from one of the devisees the 2d of *January* following; the answers did not come in till the latter end of *January*.

It was objected by *Willis's* counsel, that depositions taken in the former cause on behalf of the heir at law, the plaintiff in the present, to prove the devisees papists, could not be read against the defendant *Willis*, because this is merely a bill for establishing a will, and does not make such a *lis pendens* as will affect this defendant, especially as the answer did not come in till after the purchase.

LORD CHANCELLOR,

It would be attended with great inconveniences, and evade the justice of this court, if these depositions should not be allowed.

The answers not coming in till after *Willis's* purchase, will make no alteration, because, by the necessary forms and delays of this court, very probably they could not be put in sooner.

In bills of this nature for establishing a will, and perpetuating the testimony of witnesses, the advantage ought to be mutual, and the heir at law is as much at liberty to invalidate the will,

(1) See *Worfeley v. Earl of Scarborough*, post. 3 vol. 392.

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GARTH V.
WARD.

as the devisees are to establish it, and must be considered intents and purposes, as a *lis pendens*, or otherwise it v make the only method, which by the law of *England* is po out for proving a will, vain and nugatory.

If an heir conveys an estate to a stranger whilst there is a suit for establishing a will, and it is afterwards established, the grantee of the heir is bound.

Suppose an heir at law to get into possession of the cestor's estate immediately upon his death, and that during suit in this court, for establishing the will of the ancestor in favour of the devisees, the heir conveys this estate to a stranger and afterwards the will is established in this court, can contended that the grantee of the heir is not bound, and this suit will be looked upon as no *lis pendens* as to grantee?

If, during a suit to redeem, the mortgagor assigns the equity of redemption, and there is a decree against him, the assignee is bound by it.

So in the case of a mortgagor who comes here for redemption of a mortgage, if during such suit he should assign the equity of redemption, and, in the final hearing of the cause, there should be a decree against the mortgagor, will not the assignee of equity of redemption be bound by this decree?

If an heir at law in a suit to establish a will, prevails to set aside the will, he shall have the benefit of the evidence in that cause against a purchaser *pendente lite*.

So, on the other side, is it not equal justice (if an heir in a bill brought against him by devisees to establish a will, should prevail to invalidate or set aside the will, from an incapacitated testator to devise) that such heir at law should have benefit of the evidence in that cause, against a person purchased from the devisee *pendente lite*? for these reasons the decrees were allowed to be read.

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Case 152.

Gryle versus Gryle, April 27, 1741.

S. C. Barn. Chanc. Rep. 455.

A will executed in the presence of two witnesses, afterwards testatrix said, this is my will, in the presence of a third, but did not put her seal, nor say her name was of her hand-writing. Lord Ha inclined this was a void will, because not exactly conformable to the statute.

A Will was executed first in the presence of two witnesses afterwards the testatrix said this is my will, in the presence of a third, and desired he would attest it, but did not put her seal, neither did she say that her name was of her own hand-writing.

Lord Ha inclined this was a void will, because not exactly conformable to the statute.

See also the following Cases cited in support of this will, were Can versus Mares. H.C. February 25, 1718, before Lord Macclesfield. 3 Mod. 2 Chanc. Caf. 109. Precedents in Chancery 184. Cook v Parsons. Lodge versus Jennings, Cases in the Exchequer i land 289.

Sealing her will, without signing, in the presence of a third witness, would have been sufficient to make it a good will.

Lord Chancellor gave no absolute opinion, but was inclined to think that this was a void will, and mentioned the case *Lea and Libb**, because it is not exactly conformable to

* The testator made his will in writing, subscribed by two witnesses, and devised his lands to W. R. afterwards he made a codicil, in which the will was recited, also was attested by two witnesses, one of which was a witness to the will, but it was a new one; the question was, whether this new witness should make a new will, the statute requiring that there should be three; and adjudged that he not. *Lea versus Libb, Carthew 35.*

onies required by 29 C. 2. *the Statute of Frauds and Per-*
unels it had been re-sealed by the testatrix in the pre-
 of the third witness, and unless she had declared it to be
 nd-writing; sealing without signing in the presence of
 tness, he seemed to think, would have been sufficient to
 a good will, but said it was a point proper to be de-
 at law; on suggestion of the plaintiff's counsel that
 ad been done which might amount to a confirmation of
 l, the cause was ordered to stand over *.

GRYLE V.
 GRYLE.

pecial verdict was found upon an ejectment; the case was this, the testator
 executed his will in December 1735, in the presence of two witnesses, who
 e same in his presence; afterwards, in the year 1739, he with his pen went
 ame, in the presence of a third witness, who subscribed his name in his pre-
 at his request; and the question was, whether this be a due execution of the
 the statute of frauds and perjuries, 29 Car. 2. c. 3. *sect. 5*

ely argued for the heir at law, that the statute requiring three witnesses to
 in the testator's presence, must intend they should be all present together, else
 at that degree of evidence the statute requires, for an attestation of three wit-
 different times, has only the weight of one witness.

les to a will not only attest the due execution of a will, but likewise the ca-
 a testator at the time of the execution, a man may be *sane* at the time two
 attest, and *insane* when the third attests; it cannot be considered as a will,
 rd witness has signed, for that completes the act.

ll here is dated in 1735, suppose lands purchased after the date, and before
 by the third witness, will the lands pass? certainly not. He cited *Lea*
b, Carib. 35, and *Showers 69*. and *Justin. Instit. lib. 2. tit. 10. de testamentis*

nks e contra for the devisee; he argued, that a will executed before three
 though at three different times, is good within the stat. of frauds and per-
 e statute not requiring they should all be present at the same time.

quisites under the statute are, that the testator should sign in the presence of
 essies at least, and that they should attest in his presence; it would therefore
 new requisites which the act does not mention, and in effect be making a
 He cited *Cook v. Parsons, Prec. in Chan. 184.* and *2 Cb. Cas. 109. Anon.*

Chief Justice Lee. This case depends upon the words of the statute; the re-
 the statute are, that the three witnesses should attest his signing, but it does
 the three witnesses should be all present at the same time.

has been no determination as to this point. In the case of *Cook v. Parsons*, the
 signing was held good though it was not before three witnesses at the same
 the court only doubted whether the testator's barely owning the subscription
 before one of the witnesses, was good, but there was no doubt as to the va-
 re will, from the execution at different times.

ou have the oath of three attesting witnesses, this is the degree of evidence
 y the statute, and the same credit is given to three persons at different times
 me time.

not carry the requisites further than the statute directs, the act is silent as to
 alar, it would therefore be making a new requisite; the signing is the same
 ted; the testator in the principal case, went over his name again, and de-
 be his last will. Judgment against the heir at law. *Jones v. Lake, Feb.*
in the court of King's Bench (1).

3. C. 2. *Vof. 455*. So *Stonelovse v. Dormer v. Thurland*, 2 P. W. 509. *Car-*

Case 153:

Sir Thomas Standish versus Radley, April 29, 1741.

S. C. Barn, Cha.
Rep. 463.To oblige a man
to sign and inrol
a decree made
against himself,
in order to intitle
him to bring a
bill of review, is
altogether un-
necessary.

A Bill was brought in 1713, by the representatives of the five younger children of Sir Richard Standish, viz Alexander, Ralph, John, Hugh, and Peter, against Sir Thomas Standish, who was descended from the eldest son of Sir Richard Standish, and no evidence appearing of an actual payment of any of the portions, nor any release produced, except with regard to Ralph Standish only, Sir Thomas Standish was decreed by Sir Joseph Jekyll, at the hearing of the cause in 1717, to satisfy the plaintiffs for the several sums due to them for portions, as the representatives of the younger children of Sir Richard Standish. Since this decree, Sir Thomas Standish found two releases, one from Peter Standish, and another from Alexander, and three receipts from Hugh, for their several portions, and all of them in the hands of a person who claims under the purchaser of Sir Richard Standish's estate, which was charged with the portions.

Upon this foundation the present bill was brought as a supplemental bill by Sir Thomas Standish, praying that he might have the benefit of the releases, and likewise a petition of rehearing in the nature of a bill of review, to revise and consider the decree in the former cause, as it has never been signed and inrolled, though made as long ago as 1718.

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LORD CHANCELLOR,

I am of opinion Sir Thomas Standish is intitled to be relieved and first I shall consider the method of proceeding in this cause.

Where a decree
has not been
signed and in-
rolled, a bill in
the nature of a
bill of review, a
proper one (1).

The bringing a bill in the nature of a bill of review to revise a decree in a former cause which has not been signed and inrolled is a very proper one: and it is a very fruitless thing to put a man to sign and inrol a decree which is made against himself, in order to intitle him to bring a bill of review, besides the great expence which attends it.

Therefore I think this method of proceeding will answer the design of the court best in bringing new matter before them, discovered since the former decree.

Next, as to the merits of the case: It cannot be said that it is absolutely clear, but however, the weight of the evidence is greatly in favour of Sir Thomas Standish.

Portions which
became due in
1673, sued for
in this court in
1717, such a
length of time
creates a strong
presumption they
are paid, and it
almost amounts to proving a negative to induce the court to believe they are still unpaid,

It was originally a demand for younger childrens' portions, arising under a settlement in 1657, and a will made in consequence of the settlement, and which portions became payable so long ago as 1673, such a length of time must create a very strong presumption of their having been paid, and it must almost amount to proving a negative to induce the court to believe that

(1) *Llewellyn v. Mackworth*, ante 40. *Wortley v. Birkenhead*, post. 3 vol. 811,

they are still unpaid, and the *Master of the Rolls* has stretched a good deal to decree in 1717, that the portions were unpaid, when the *presumption from length of time* must even then have had considerable weight (1).

Sir THOMAS
STANDISH, v.
RADLEY.

The *master of the Rolls*, upon a release being produced from *Ralph Standish*, one of the younger children, for his portion, by the decree in 1717, dismissed the bill as to his representative.

As to the portion of *Peter Standish*, it is insisted by Sir *Thomas*, that since the decree for *Peter's* representatives, he has found a release from *Peter*, which is the foundation for the bill of review.

The rule to review and revise a former decree is, the discovery of new matter, since the making of such decree, which was in being at the time, but was not known to the party till afterwards.

The discovery of new matter in being, at the time of a decree, but not known till after, intitles the party to a review.

There can be no reason why this release should not weigh with me as much now, as the release produced by *Ralph* did with the *Master of the Rolls* in the former cause.

Next as to *Alexander's* portion, the release he has given for it is in the same form and words with *Peter's*, and therefore these releases are a bar to the demand set up by each of their representatives.

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In order to shew that *Hugh Standish's* portion was paid, three receipts under his hand were produced as evidence.

It has been objected, these receipts cannot be read in this cause, because they were in the hands of some of the parties to the former cause after publication had passed, and the rule in bills of review is, that it must be new matter discovered after the decree.

Papers in the hands of a party to a former cause, after publication had passed, tho' not produced then, may be read upon a bill of review.

But I think this would be too strict, for as they were not discovered till after publication in the cause, they could not possibly be made use of then; and besides, it appears that the present plaintiff Sir *Thomas Standish* did not know any thing of these receipts till long after the decree.

Next as to the parol agreement between the representatives of *Hugh Standish* and Sir *Thomas Standish*, before the bringing the present bill.

Now this was not by way of compromise on consideration of the doubts and difficulties which arose in the case, but it was only on Sir *Thomas Standish's* agreeing to pay 3000*l.* by instalments, provided they would abate 278*l.* odd money, and therefore does not bring it within the reasoning in the case of *Can v. Can*, 1 P. W. 723, and consequently does not prevent Sir *Thomas Standish* from availing himself of this discovery, in re-

(1) See *Smallman v. Hamilton*, ante 3 vol. 105. *Jones v. Turberville*, 4 Bro. 11. *Surt v. Mellish*, post. 611. *Fotherby v. Hartridge*, 2 Vern. 21. *Ramsden v. Blum*, 2 Fej. 309. *La. on v. Briggs*, post. 3 vol. 105. *Jones v. Turberville*, 4 Bro. 115. *Oughterloney v. Earl Powis*, Amb. 231. *Worsley v. Granville*, 2 Fej. 333.

Sir THOMAS
STANDISH v.
RADLEY.

lation to the receipts of *Hugh Standish*, for his part of the marriage portion.

On the 4th of *May* 1741, Lord *Hardwicke* declared that the releases given by *Peter* and *Alexander* to their brother Sir *Richard Standish*, dated the 16th of *January* 1673, and the 24th of *March* 1675, are sufficient bars to the demands made by the plaintiffs in the original causes of the original and additional portions of *Peter* and *Alexander*, and of any interest for the same, and therefore decreed, that so much of the former decree as relates to these portions of *Peter* and *Alexander* be reversed; and that the plaintiff's bill in the original cause, so far as it relates to these demands, do stand dismissed; and Sir *Thomas Standish* should be allowed what has been paid by him subsequent to the former decree.

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Grosvenor versus Lane, on Exceptions, April 29, 1741.

Case 154.

P. gives a third of a moiety of the residue of his personal estate to

S. P. the mar-

ries, and, whilst out of the kingdom, assigns with her husband this third of a moiety which was to arise

out of *P.*'s estate, in trust for their daughter, provided they died before they came to *England*: *S. P.*

afterwards married a second husband, who survived her: If the mother had continued a widow, she would

have been intitled to a decree for this third, and so notice would have been taken of the child's interest.

MR. *Phipps* by his will gave a third part of a moiety of the residue of his personal estate to his daughter *Susan Phipps*.

LORD CHANCELLOR,

This is an unliquidated thing, and properly a chose in action.

Afterwards *Susan* marries one Mr. *Lane*, but survives her husband, who left one daughter *Catherine Lane*; while the father and mother were in *Africa*, they had assigned over this third of a moiety which was to arise out of Mr. *Phipps*'s estate, in trust for the daughter, provided they should die before they came to *England*.

But I am of opinion, if the mother had continued a widow, the court must have decreed it to her without taking any notice of the child's interest.

Before any decree in this cause, and before the money was reduced into possession, she marries a second husband, Mr. *Peake*, who survived her.

A husband cannot sue for a wife's chose in action, till he has administered.

A husband, after the death of a wife, cannot sue at law for choses in action of the wife in his own right, but he must first take out administration to the wife (1).

The next is the principal point to be considered with regard to the infant, in a court of equity, and what provision she is to have out of her mother's fortune.

Now, tho' the law may give this money to the husband, yet equity will not do it.

(1) See *Harg. Co. Litt.* 351. a. note 1. *Squib v. Wyn*, 1 P. W. 378.

GROSVENOR
V. LANE.

Suppose Mr. *Lane*, the first husband, had come before the court for this sum of money, the court would not have decreed it, unless he had agreed to make some provision for the wife, in case she had survived, and likewise by way of portion for the infant.

The wife being dead, and the second husband also, the residuary legatees under this will claim an interest in the money.

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At the hearing of the cause, the Court then took so far care of the infant, as to order a maintenance for her out of the portion; and directed Mr. *Peake*, who was then living, to lay proposals before the Master what he would settle out of this money as a portion for the infant.

Therefore I must take it from this decree, that they would not suffer Mr. *Peake* to meddle with the money till he had agreed to make some provision for the infant.

Besides this, there was a decree in 1732, made by Lord Chancellor *King*, who always leaned as strongly in favour of the husband, and in support of legal rights, as any Chancellor who ever sat here, and yet the equity was so strong for making some provision for the infant, *Catherine Lane*, that he yielded to it.

Mr. *Peake*, by two letters to the aunt of the infant, in 1731, has declared he was very desirous of allowing her the whole produce of her mother's fortune, arising from a third of Mr. *Phipp's* residue of his personal estate, as he believes, according to his own expression in the letters, that it would maintain the daughter like a gentlewoman, provided he was indemnified from the charges and expences in Chancery.

As he is dead, I must take these letters, not as a mere proposal only, or a bare hint of his intention, but an absolute appropriation of the fortune by the second husband for the benefit of the infant.

The second husband having by letters in his life-time, declared he was willing the

daughter should have the mother's whole fortune; as he is dead, these letters are not to be taken as a bare hint, but an appropriation of the fortune for the benefit of the infant.

There is all the equity in the world, that there should be some provision for the daughter out of this sum of money as her mother's portion.

As to the *quantum*, it depended upon the father-in-law; and by these letters, according to the opinion I have given of them, he has very honestly and conscientiously alligned the whole as a provision for the infant (1).

(1) His Lordship declared, that the sum of 1599*l.* which was originally the share of *Susan Lane*, the mother, hath been well appropriated, and doth, in equity, belong to the plaintiff, the infant. *Reg. Lib. A.* 1740. fol. 382.

Cafe 155.

Haly versus Lane, May 4, 1741.

21
Hobson
Hess & Co.

If a husband indorses a note given him by the wife, as between him and the indorsee, it is good.

THOUGH a note given by a wife to a husband, yet if it is indorsed over by the husband, as between him and the indorsee, it is certainly good (1).

616. Indorsee of a note may recover against an indorser, though the original drawer was an infant. In cases of like nature, I have, at the sittings of *nisi*, directed a jury to find for an indorsee, notwithstanding that the indorser had the note from an infant, the original drawer.

Q. B. 805 Though former indorsee might not pay a valuable consideration, yet if the last gave money for it, it is a good note as to him.

Where there is a negotiable note, and it comes into the of a third or fourth indorsee, though some of the form dorsee might not pay a valuable consideration, yet if the indorsee gave money for it, it is a good note as to him, there should be some fraud or equity against him appear the case.

(1) The plaintiff's wife (who had a separate estate) gave a promissory note, payable to her husband or his order, who indorsed it over; the note was afterwards negotiated, and came into the hands of one of the defendants for a valuable consideration, who denied he knew of its being indorsed over to the *first* indorsee, to whom it was given as a security for the payment of the balance of a certain account, and whose name did not appear thereon. The plaintiff had also given the defendant a bond for securing the money due on

the note, Decreed that the def
was entitled to the benefit of the
(there being a dispute between t
fendant and the assignees of the l
dorsee, as to the right of the note in
tion) : and it being admitted, that
ment had been recovered on the as
bond, and that the principal, inter
costs had been paid, it was order
satisfaction should be acknowledg
the said judgment. *Reg. Lib. A.*
fol. 379.

Cafe 156.

Mackworth versus Briggs, Exceptions, May, 6, 1741

A Bill was referred to the Master for impertinence, reports it pertinent, the defendant takes a general objection to this part of the report, without specifying the parts of the bill which are impertinent.

It was objected that the exception is irregular, for this bill being 100 sheets, and the amended bill 200 sheets, the Court must necessarily consider the whole as the exception was made general.

The Chancellor over-ruled the objection, and said, notwithstanding the exception is taken in so general a manner, ye may go upon it without pointing out particular passages: such for instance, from the 20th to the 100th sheet should be impertinent, how could they have the benefit of their exception *unless they had couched it in such general terms.*

Gibson versus Smith, May 9, 1741.

Case 157.

THE plaintiff being a trustee of the late Duke of *Whar-*
ton's estate, for the benefit of creditors, and having sold
a part to the defendant, with a particular exception and refer-
vation of the waste of the manor, and all mines in the said
wastes, by virtue of a *proviso* in the deeds of conveyance, has
brought this bill to prevent the defendant from committing
waste, by opening mines, &c.

It was objected, that the bill is not properly brought, as this
is not a matter for the determination of a court of equity, that
it is a mere legal right, and a legal estate, and consequently there
was no occasion to come into this court.

LORD CHANCELLOR,

The plaintiff may certainly come into this court to restrain
the defendant from opening the mines, &c. even if he has only
threatened to do it; nor is it necessary the plaintiff should have
waited till the waste is actually committed, where the intention
appears, and the defendant, even by his answer, insists on his
right to do it: there are a great many cases where such bills
have been allowed; and indeed, if the defendant, by his answer,
had disclaimed any right, there would have been no grounds for
such a suit.

If a bill is brought by an owner of a reversion against a tenant
for life, and no proof appears of any waste, yet if tenant for
life insists upon his right, and it is proved that he has none, this
court will grant an injunction.

and has none, the reversioner may have an injunction.

As to the merits of the cause, the first point is with respect to
the grounds, that are called the common of pasture, which the
defendant insists are confined to a cow pasture only.

But the plaintiff charges, by his bill, that they are the waste
of the manor, and that there is an exception of all mines which
are in the waste.

The defendant, on the other hand, says, that this is not pro-
perly waste, but enjoyed by the customary tenants, and is part
of the soil belonging to these tenants; and if he had made out
this fact, there could have been no pretence for the claim the
plaintiff sets up by virtue of the reservation.

But I am of opinion that they are to be considered as part of
the waste of the manor, and the common of it; for by the evi-
dence it is plain that the common of pasture lies intermixed
with the other commons which are enjoyed with the rest of the
manor: from the middle of *September* to the middle of *April* the
gates of these grounds, which were stinted for four months, are
thrown open and laid to the other common, and are enjoyed by
all the inhabitants.

S. C. Barn. Cha.
Rep. 491.

If a person has
only threatened
to open mines, a
plaintiff may
certainly come
into this court,
to restrain a
defendant from
doing it (1).

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It is not neces-
sary to stay till
waste is actually
committed,
where the in-
tention appears,
and the person
insists on his
right to do it (2).

Though no proof
appears of waste,
yet if tenant for
life insists on a
right to do it,

and has none, the reversioner may have an injunction.

See
Milner
2. 48. 22.
615

(1) *Whitfield v. Bewit*, 2 P. W. 240.
Lambert v. Stamper, post. 3 vol. 495.

(2) *Vide Harg. Co. Litt.* 218. b. n. 2.
Perrot v. Perrot, post. 3 vol. 94. *Garth*
v. Cotton, post. 3 vol. 751.

GIBSON v.
SMITH.

In several manors there are some part of the tenants only have a right of commoning, and yet it does not follow may be waste, and belong to the lord as much as if it was neral common.

This sort of tenure, called tenant-right estate, is now settled (1), and is in no dis-favour of the court, though i otherwise at the time of the decree in the reign of Jac. 1. Philip Lord Wharton, lord of this manor, was plaintiff some of the customary tenants defendants.

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The being stinted does not at all prove that they a waste, but only for the benefit of the tenants, and are n this reason less the waste of the lord than before.

It would be very hard upon a bill *quia timet*, where th not the least syllable of proof that the defendant has opene mines, to grant an injunction on a suspicion or a threatn do it, where the defendant insists not upon his right.

The next point is as to the free rents, and I am cl opinion that they pass by the general word *rents*, and even have passed under the word *manor*, if they had : the drawing of these conveyances been so explicit, and fore there is no ground for the defendant to re-convey the free rents; and as to this part, the plaintiff's bill ough dismissed.

(1) Vide 1 Bro. Cha. Rep. 198.

Case 158. Underwood, and Agnes his Wife, versus Morris, May 13, at the Rolls.

A. gives 2000l. to Agnes his daughter, payable at her age of 21 or marriage, if she marries with the consent of his executors; provided if either of the legatees die before their legacies become payable, such legacy to be divided the survivor of her brother and sisters. Agnes married at fifteen without the consent of the e. Mr. Justice Parker held it to be a devise *in rerum*, and that the legacy is vested, as marriage the contingencies, has happened.

A Father, by his will, gives the plaintiff, Agnes his daughter, the sum of 2000l. to be paid when she should attain h of 21, or day of marriage, if she marries with the consent executors, under his will (1), provided if either of the legat before their legacies become payable, then such legacy to vided between the survivor or survivors of her brother and

Agnes married at fifteen without the consent of the e. Mr. Justice Parker held it to be a devise *in rerum*, and that the legacy is vested, as marriage the contingencies, has happened.

Agnes marries the plaintiff, Underwood, at her age of 15, out the consent of the executors.

The question, whether, as Agnes has married without ecutors' consent, this devise is not to be considered as a over, and that consequently the legacy will not vest unle arrive at her age of 21.

Mr. Justice Parker. It is objected the time of paym not come, because it is a marriage without consent of tr and that it must wait the event of Agnes's attaining h of 21.

(1) The testator gave several other legacies to his other chil

t as this is a mere personal legacy, I am of opinion it is
 ife *in terrorem* only, and that it vests absolutely in the
 iter, and that marriage, one of the contingencies upon
 it became payable, having happened, the executors must
 creed to pay it to the plaintiffs, with interest at 4*l.* *per*
 o be computed from the death of *Agnes's* father, the testa-
 But the plaintiff *Underwood* must first make a proper pro-
 for *Agnes* before he is allowed to touch the money (1).

UNDERWOOD
 v. MORRIS.

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Though the authority of this case
 ven much questioned, (see *Hem-*
v. Munkley, 1 *Bro. Cha. Rep.* 303.
v. Tyler, 2 *Bro. Cha. Rep.* 488.)

yet the case is here correctly reported.
Reg. Lib. B. 1740. fol. 288. See *Harvey*
v. Aston, ante 1 vol. 361. note at the end.

Combe versus Combe, June 1, 1741.

Case 159.

JAN Combe had one son named *Bennet*, and in 1713 he
 ntermarried with a second wife; previous to that marriage,
 a consideration thereof, articles were entered into, whereby
 s agreed, that the sum of 1000*l.* which was the fortune of
 rife, together with the sum of 2000*l.* which came from
 usband, should be vested in the hands of trustees on the
 ving trusts, that the 3000*l.* should be put out at interest in
 ames of these trustees, and that they should pay the interest
 of to *Bryan* during his life, and after the death of *Bryan*
 hey should pay the interest of the sum of 2000*l.* to *Ann*
 ier life for her jointure, and in full satisfaction of her
 r: the trust was further declared to be, that after the death
 -yan, the trustees should employ so much of the interest of
 emaining 1000*l.* as they should think fit, in the mainte-
 e and education of such child and children as *Bryan* and
 should happen to have, and leave behind them, and that
 uplus of the interest of that 1000*l.* if any, should be put
 and continue to carry interest under the same trust, as is
 fter mentioned relating to the other money.

Under marriage
 articles 2000*l.*
 part of 3000*l.*
 vested in trust-
 tees, is to be
 paid to such son
 as shall live to
 attain the age of
 21, when and at
 such time as he
 shall have attain-
 ed the age of 23,
 The eldest son
 attained his age
 of 21, but died
 before 23.

Lord Hardwick
 held that he be-
 came absolutely
 intitled to the
 money, and the
 time of payment
 only was post-
 poned to the
 age of 23.

ie trust was further declared, that after the death of *Bryan*
Ann, and the survivor of them, the trustees should pay this
 of 2000*l.* to such son of the body of *Ann*, by *Bryan* to be
 tten, as should live to attain the age of 21, when and at
 time as such son should attain the age of 23.

ie trust was farther declared, that the trustees should, out
 e interest of the 2000*l.* in the mean time, employ and pay
 uch thereof, as they should think convenient for the main-
 ice and education of such son, and that they should em-
 the residue of the interest of the 2000*l.* for the benefit of
 ther children of that marriage, in such manner as *Bryan*
 ld, by any writing under his hand and seal, appoint; and in
 ult of such appointment, that the trustees should pay the re-
 of the interest of the 2000*l.* unto such of the children of
 -marriage, except the eldest son, as should attain the age

The

COMBE v.
COMBE.

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The trust was further declared, that as for and concerning the remaining 1000*l.* the trustees should pay the same unto the children of that marriage, other than the eldest son, in such proportion as *Bryan* should appoint; and in default of such appointment, that the trustees should pay this sum amongst the children share and share alike, at their respective ages of 21 or marriage which should first happen.

The trust was further declared to be, that in case there should happen to be only one son of this marriage, or in case the other children should happen to die before they should attain their age of 21, or marriage, that then the trustees should pay the residue of the interest of 2000*l.* to the eldest son of that marriage; and upon this further trust, that in case there should happen to be no son of that marriage, or if such sons should die before they should attain the age of 21, that then the trustees should pay the same to such daughter as should be of that marriage, in such proportion as *Bryan* should appoint; and in default of such appointment, the trustees should pay the same to those daughters share and share alike.

And upon this further trust, that in case there should be no children of that marriage, the trustees should pay the sum of 3000*l.* to such persons as *Bryan* should appoint.

Then came the following proviso: Provided always, and it is further agreed, by and between all parties to these presents, and hereby so declared, that the said sum of 3000*l.* shall be laid out in an estate as soon as conveniently may be, and that such estate which shall be purchased with the said 3000*l.* shall be purchased in the name or names of the said *Francis Bennet* and *Henry Humber*, and *Ann*, the intended wife, or the survivors of them, or such others as they shall nominate, direct, and appoint, and that the said estate so to be purchased, when the same shall be purchased, shall be under the same trusts, and to the same uses and limitations, and subject to the same provisos conditions, and agreements, which are herein declared and appointed of, for, and concerning the said sum of 3000*l.* To this deed a schedule was annexed of the several mortgages and other securities of which the 3000*l.* consisted.

Soon after this deed was made, the marriage took effect, and by this marriage there was issue an eldest son named *Bryan*, and there was a second son named *Joseph*, and two or three other children. After the marriage 2296*l.* part of the 3000*l.* was laid out by the trustees in the purchase of lands: all the lands were fee-simple, excepting a small part thereof, which was leasehold estate; that leasehold estate consisted of a long term the purchase of it was 300*l.* and it was bought before the fee simple estate was.

Ann died in 1732. *Bryan* the father died in 1736. *Bryan* the son, being then of the age of 19, who lived to attain his age of 21, but died before he was 23, on the death of his father had entered upon the lands which were purchased by the trustees: *Joseph* became his heir at law, and the present bill was brought by him against *Bennet Combe*, against the younger child

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children of the second marriage, and against others, praying that he might have the benefit of the estates which were so purchased by the trustees, and that the 2000*l.* agreed to be laid out in land for the benefit of the eldest son of the second marriage, might be considered as land.

Lord Chancellor said, his opinion was, that the plaintiff was not intitled to this part of the prayer of the bill: he said the only question of weight in the cause is, Whether this is to be considered as a real or personal estate; and this is a matter of some nicety, considering the manner in which the articles are framed.

But two questions have been made in the present cause; first, Whether this is to be considered in equity as money? and secondly, supposing that it is, whether it ought to be considered as a vested interest in *Bryan*, the son, on his attaining the age of 21.

With regard to the second of these questions, his Lordship said, it might be thrown out of the case; for his opinion clearly was, that this was a vested interest in him upon his attaining his age of 21.

The words of the articles are, "That after the death of *Bryan Combe* and *Ann* his wife, and the death of the longest liver of them, that the said trustees shall pay the said sum of 2000*l.* part of the said 3000*l.* to such son of the body of the said *Ann* by the said *Bryan Combe*, begotten or to be begotten, as shall live to attain the age of 21 years, when, and at such time as such son shall have attained to the age of 23 years complete."

It has been objected by Mr. *Flemer*, that this is a mere direction for payment of the money to such son as shall attain his age of 23, and that the words relating to the son's attaining his age of 21, are only part of the description of the person who is to take (1).

And it is indeed true, that in this clause of the articles there is no particular direction concerning the vesting of the 2000*l.* but the words relating to it only direct the payment of the money; and therefore if this had been a legacy given by a will, the party would not have been intitled to it, in as much as he died before his age of 23. But were these articles to receive this construction, that it should not be considered as a vested interest in *Bryan*, by reason that he died before his age of 23, it would defeat the whole intention of the articles: it is indeed true that the articles are oddly penned.

For though they seem to be general, and to relate to all such persons as should live to attain the age of 21, and that the money should be paid them when they should attain the age of 23, yet the eldest son was only meant in those words: and when there was an eldest son that attained his age of 21, he became absolutely intitled to the money, and the time of payment was postponed only to his age of 23.

(1) See *Chandos v. Talbot*, 2 Cox's P. *Prosser v. Abingdon*, ante 1 vol. 492. 612. *Har. Co. Litt.* 237. a. n. 1, *Stedman v. Palling*, post. 3 vol. 427.

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The other question his Lordship said was more difficult, but as far as he was able to form any judgment, his opinion was that this must be considered as money, notwithstanding the general determination of these cases was to the contrary (1): in the ordinary ones of this nature the original and primary intention of the parties appears to be, that the money should be laid out in land: and the other directions about vesting it in the hands of trustees, are only temporary provisions till that can be done.

But what is the method taken in the present case; in the first place the whole sum of money is immediately vested in the hands of trustees, and then the articles carve out certain proportions of the money, directing in what manner it is to be applied; 2000*l.* is to be paid to the eldest son, and the 1000*l.* for the benefit of the younger children, in such manner as the articles direct; there is likewise a direction given concerning the interest, how that is to be disposed of; and after this done, then follows the proviso, which creates the doubt in the present case.

3000*l.* is vested in trustees for the purposes following, viz. 2000*l.* thereof to be paid to the eldest son, and 1000*l.* for the benefit of younger children, and agreed under the articles before marriage, the 3000*l.* should be laid out in land, and the estate so purchased shall be to the same uses, &c.

Decreed that the lands shall be taken as money, the laying it out upon real estate being merely to make the same for the benefit of the children more permanent and secure.

Provided always, and it is farther agreed, by and between the parties to these presents, and hereby so declared, that the said sum of 3000*l.* shall be laid out in an estate as soon as conveniently may be, and that such estate shall be purchased with the said 3000*l.* in the name or names of the said *Francis Benn Henry Humber* and *Ann* the intended wife, or the survivor of them, or such others as they shall nominate, direct, and appoint; and that the said estate so to be purchased shall be under the same trusts, and to the same uses, limitations, and intentions, and subject to the same provisos, conditions, agreements, which are herein declared and appointed of, and concerning the said sum of 3000*l.*

It is indeed true, that the proviso directs this money should be laid out in the purchase of an estate; but then it expressly declares that the estate, so purchased, shall be under the same trusts as are appointed concerning the sum of 3000*l.* This is a plain direction that the lands shall be taken as money: consider this then upon the intention of the parties, as there is the same direction about investing the 1000*l.* it is impossible to conceive that it could be their intention that the land which was to be purchased with the 1000*l.* should always be considered as land, and go to the younger children and their heirs.

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The plain intention of these articles certainly was that the money should only be laid out in land, in order to make it more permanent and secure, and that the land should be sold again when the children should have occasion for their money, and his Lordship was pleased to decree accordingly (2).

(1) See *Wheaton v. Fall*, ante 123.

(2) Decreed that the sum of 2000*l.* part of the said sum of 3000*l.* agreed to

be settled by the said articles, is part of the personal estate of the said *Bryan Com* the son. *Reg. Lib. A.* 1740. fol. 495

Dean and Chapter of Ely versus *Warren*, June 2, 1741.

Case 160.

THE end of the bill was to prevent waste in digging and carrying away the soil in manors that lie in the levels in *Cambridge*shire.

Evidence of customs in a neighbouring manor, offered to be read, to shew the customs of the manor in question.

The evidence of a neighbouring manor shall not in general be

admitted to shew the custom of another manor.

LORD CHANCELLOR,

It is certainly the rule of law in general, that the evidence of neighbouring manors shall not be admitted to shew the custom of another manor, because every manor is to be governed by its own customs.

King of Hants
initially
Beavan

But this rule is not so universal as not to be varied in some instances; as in mine countries, *Derbyshire*, &c. the courts of law have admitted evidence with regard to profits of mines, &c. out of other manors where they are analagous and similar, to explain or corroborate the custom of the manor in question.

Courts of law have admitted evidence with regard to profits of mines out of other manors, where they are similar, to explain the custom of the manor in question.

plain the custom of the manor in question.

Now, in the present case, there is a great similitude in the manors, because this is a fen country, which is of very large extent, and the nature of fens and marshes throughout England are pretty much the same.

Marquis of Angle
Ld. Hastings
10 Nov. 1741

The custom here is, to dig up the lord's soil for turf which is a very odd custom if applied to any other soil: but fenny and marshy lands are often overflowed, and lie buried under water for seven or eight years, and produce no profit at all to the copyholder, and therefore, by way of compensation, when the water is drained, and the land improved from the additional soil brought by the floods, the copyholder may be intitled to common of turbary; and this seems to be a plausible pretence for such a right; and therefore the evidence offered by the plaintiff must be read.

Copyholders in fenny lands may be intitled to dig up the lord's soil for turf.

Though depositions taken *de bene esse* are irregular, yet at the hearing of the cause it is too late to make the objection for irregularity; but in such case you ought to have moved the Court to discharge the order for publication.

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It is too late at the hearing of the cause to object to depositions taken *de*

bene esse; you should have moved to discharge the order for publication.

The nature of common of turbary is very well known, which is nothing more than such a quantity of turfs as may be sufficient for the house to which the common is appendant; but here the custom is laid, not only in the tenants, but the occupants, which is a very great absurdity, for an occupant, who is no more than a tenant at will, can never have a right to take away the soil of the lord.

An occupant who is only a tenant at will, can never have a right to a common of turbary.

Dean and
Chapter of ELY
v. WARREN.

This court will
not put persons
to set forth a
custom with the
exactness as is
requisite at law,
or as the Exchequer expects.

The Court of Exchequer, where there has been an imperfect *modus*, have taken a short method, by decreeing the defendant to pay tithes; but this Court will not put persons set forth a custom with so much exactness as is requisite at law, or with so much nicety as the Court of Exchequer expects.

The custom, in this case, is so extraordinary, that if the evidence had not been very strong in the support of it, I should not have directed an issue to try the custom, but should have decreed an injunction to stay waste in digging up the lord's soil.

Before the act of parliament in 15 Car. 2. ch. 17. for the improvement of the great level of the fens, the lands in question were common, and then they might take away turf, but being severed by this act (*vide sect.* 38.) and annexed to particular tenements, it might very probably lead the tenants into mistake, that they had the same right to dig turf after severance as before.

Case 161.

Roy versus The Duke of Beaufort, June, 5, 1741.

The bill was for
relief against a
judgment on a
bond, in which
the plaintiff was
jointly bound

with his son, in the penalty of 100*l.* that the son should not commit any trespass in the Duke of Beaufort's royalty, by shooting, hunting, fishing, &c. except with the licence of the game-keeper, or in company with a qualified person: the son having caught two flounders with an angling rod, the bond was put in suit, and judgment for the penalty: the game-keeper's brother-in-law, and another servant of the Duke's asked the plaintiff's son to angle with them, when he caught the two flounders; and the verdict was found merely on their evidence. Lord Hardwicke decreed the plaintiff should be relieved against the verdict, and that the Duke should refund the 100*l.* recovered on the bond, and the 40*l.* damages.

Parliament Hill
S. C. March 27

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ward v. A. Kebley
Bm. & Warren.
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The plaintiff was jointly bound with his son in a bond the penalty of 100*l.* that the son should not commit any trespass in the Duke's royalty, by shooting, hunting, fishing, &c. unless with the licence of the game-keeper, or in company with a qualified person.

The son afterwards having caught two flounders, with an angling rod, in the Duke's royalty, the bond was put in suit against the plaintiff, and judgment for the penalty.

Two of the Duke's servants, one of them brother-in-law, Marks, the game-keeper, asked the son of the plaintiff to go with them, and divert himself with fishing, they angled about two hours, in a navigable river, and caught two flounders.

The verdict was found by the jury merely upon the evidence of these two servants.

The plaintiff (his son being dead) has been obliged to pay the 100*l.* the 40*l.* costs of suit, though the value of the flounders was proved to be two pence only.

Th

The bond was given in 1729, while the plaintiff was under a prosecution, and in custody before a justice of peace, at the information of *Marks*, the game-keeper, for carrying a gun in the Duke's manor, and for killing a dog belonging to the Duke.

It was not pretended that the plaintiff's son killed any game, but that he carried a gun only.

Marks took him before a justice of peace that lived fifteen miles from the place, when there were several neighbouring justices within three miles.

When the plaintiff's son was before the justice of peace, they threatened him with being intirely ruined by the Duke, if he would not agree to give this bond.

From the year 1729 till 1732, it does not appear that he ever was guilty of any trespass; and even after the two flounders were caught, which was in 1732, no manner of notice was taken of it till 1734, when an information for a riot having been tried at *Winchester* (in which these very servants that decoyed the son into this fishing were convicted, on the evidence of the plaintiff in this cause) immediately after the trial, the suit was commenced upon the bond.

LORD CHANCELLOR,

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The first general question is, Whether the bond was obtained by oppression, and by the imposition of the Duke of *Beaufort's* servants?

Secondly, Supposing there is an evidence of such imposition, whether the bond will be considered only as a security that the son should not poach for the future?

Thirdly, Whether an ill use has been made of this bond?

As to the first head of relief, *oppression and imposition*, I am of opinion there is no evidence of either which ought to induce the Court to relieve.

The plaintiff's son appears to have been a person who made a practice of carrying a gun, and likewise was warned several times by *Marks*, the game-keeper, not to come into the Duke's manor: afterwards *Marks*, being upon his lawful business, finds this young man, with a gun in his hand, and might have justified seizing the dog, and though he shot him, it does not make any great alteration, because, if any body has suffered, the Duke has, who lost the benefit of the dog, which should have been secured to his own use. The carrying a gun and shooting the keeper's dog, in return for his own being killed, was a sufficient justification of *Marks* for taking the plaintiff's son before a justice of peace.

As to the point of taking him before a justice of peace who lived at the distance of fifteen miles, it is not a thing to be commended, but, however, that does not prevent his having equal jurisdiction as if he had lived in the neighbourhood; it appears, besides, that the plaintiff's son had more assistance at *Winchester* than he would have had in any other part of the country, for he had the recorder for his counsel, and it is very probable the game-keeper had an eye to having counsel himself, or he would not have thought of carrying him so far.

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The Duke of
BEAUFORT.
An unqualified
person shooting a
game keeper's
dog, will justify
a judge in direct-
ing considerable
damages.

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The taking
bonds to prevent
poaching is for
the benefit of the
obligor, as this
sort of idleness
leads to worse
consequences.

If a person in
custody confesses
a judgment,
whilst his
counsel is attend-
ing, it will not
be set aside for
duress.

There is no act
of parliament
which directs
taking bonds in
this particular
case but the acts
which relate to
the customs, and
the act against
deer-stealing di-
rects such bonds,
so that the doing
of it is not *malum*
in se.

No evidence has been attempted to be given of the justice of the peace misbehaving in the affair; on the contrary, he was favourable as not to levy the penalty of five pounds, which statute gives against a person carrying a gun being unequal nor was there any notice taken of killing the Duke's dog however trifling it may be called, if such a thing had come before me at *nisi prius*, on the insolent behaviour of the peace the time he shot the dog, and other circumstances, I have made no scruple of directing very considerable damages. As counsel appear to have been present the whole time the justice of peace, though it is not said they advised the yet I must presume they did, as nothing is shewn to the contrary.

Bonds taken for the preservation of the game, and to prevent poaching, are not only for the benefit of lords of manors even of the young persons who enter into them, as this idleness generally leads them to worse consequences.

As to oppression, if there had been any illegal advantage taken whilst he was in custody before the justice of peace might have been relieved at law, and there was no objection for a suit in equity.

But there could be none here, because his being before the justice of the peace was lawful, nor was there any improper use made to draw him into the executing of this bond: in the common case of a warrant of attorney to confess judgment by a person in custody, if he has counsel present, it will not be set aside for duress, where the imprisonment was legal (1).

Though there is no act of parliament which directs taking bonds in this particular case, yet there are statutes which authorize it in similar cases; as for instance, the acts that relate to customs, expressly direct and command such bonds to be taken to prevent and guard against offences for the future. It likewise against deer stealing commands such bonds to be taken. *Vide 5 G. 1. c. 15. sect 4.* and though there is no authority in the present case, yet it shews the doing of it is not *malum in se*.

The counsel for the plaintiff have insisted it is an excessive penalty, and to be sure it is a large one, but I do not know the courts of equity, where a bond is entered into voluntarily, have gone so far as to take into their consideration, the great smallness of the penalty. I shall be extremely cautious to give an opinion that will set aside such bonds, which, if upheld, may be of great service in the preservation of the game and an equal benefit to the obligors themselves, in taking out of an idle course of life, which poaching naturally leads into.

As to the head of security; it is most absurd to think that bonds of this kind were intended merely as a security, and nothing is to be recovered upon them (2).

(1) See *Nicholls v. Nicholls*, ante 1 vol. 409. *Vide Sloman v. Walter*, 1 Bro. Cl. 418. *Benjon v. Gibson*, post. 3 vol.

(2) *Tall v. Ryland*, 1 Cha. Ca. 183.

I am of opinion when these sort of bonds are given by way of stated damages between the parties, it is unreasonable to imagine they could only be intended as a bare security that the obligor should not offend for the future; was this the case, in what respect is a gentleman in a better condition, who has such a bond, than he was before, if, after he has obtained judgment at law, a court of equity will give him no other satisfaction than the bare value of the price of the game that is killed.

ROY v.
The Duke of
BEAUFORT.
These bonds
are not intended
as a bare security,
that the obligor
shall not offend
for the future,
but are by way
of stated damages
between the parties.

These two heads of relief may therefore be laid out of the case.

The third is the most material consideration, and that is the ill use which has been made of the bond.

No evidence has been offered to shew that ever the plaintiff's son has been guilty of shooting, fishing, hunting, &c. from the time of the giving the bond in 1729, till May 1732; after this sort of catching the two flounders, which must be admitted to be a breach, it rests for two years, and no action was brought upon the bond; then it appears that the plaintiff here was a witness in an information for a riot tried at Winchester assizes in Trinity term 1734, where the Duke's two servants were convicted, and chiefly on the plaintiff's evidence.

It is a very material circumstance that the plaintiffs son had a licence, or at least an encouragement to fish, by being in company with two of the Duke's servant, one of which was brother-in-law to Marks the game-keeper.

It frequently happens there may be a just cause of action, yet the real motives may be very unjust, which a court of equity will always take into their consideration, though they cannot at law pay any regard to it.

Where the motives to an action are unjust tho' the cause of action was just, a court of equity cannot at law.

will always take this into consideration, though they cannot at law.

It appears by the evidence that Marks, who was the game-keeper, who had the authority of the Duke, who has been a witness to the transaction of the bond, gave a licence, or at least an encouragement to this fishing, which, as it was with an angling rod only, could not be called poaching, nor was it ever so esteemed.

Fishing with an angling rod is not poaching; nor ever esteemed so.

Besides, in such a tract of time as two years, it is impossible to suppose Marks, the game-keeper, could be ignorant of this fishing, especially as his own brother-in-law was in company.

According to the condition of this bond, the plaintiff could not be relieved at law, because his son could not fish without express leave from the game-keeper, or in presence of a qualified person, so that if the Duke of Beaufort himself had given leave, there must at law have been a verdict, because it is not within the express terms of the condition of the bond.

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Now when a man has made this moderate use of his liberty of fishing, and manifestly appears to have had leave, it would be hard not to relieve against the judgment, and penalty recovered upon this bond at law.

The

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The Duke of
BEAUFORT.

The next consideration will be, as to the costs in this case, though I am of opinion the money must be refunded, would be too much to make the Duke of *Beaufort* pay because he does not appear to me to have had the least ledge of the circumstances of this case, being carried on by his agent; but if *Marks* had been before the court, I have decreed costs against him in equity, but as he is not a I must decree for the plaintiff that he shall be relieved a this verdict, and that the Duke shall refund the 150*l.* recd upon the bond, and also the 40*l.* damages, but give no c this court on either side.

Case 162.

Langley versus Brown, June 6, 1741.

JUDGMENT was given in this cause.

Lord Hardwicke held, there was no ground in this case to relieve either under the head of fraud or mistake; nor any pretence to set aside the deeds, and dismissed the bill.

A bill has been brought by the sister and heir at law *Richard Benthall*, to be relieved against the deeds executed by *Richard Benthall* in his life-time, to Mrs. *Elizabeth Brown*, a inspection of the title deeds of Mr. *Benthall's* estate, which after his death, came to the hands of Mrs. *Elizabeth Brown* are now in the defendant's custody, and in case the legal does not pass by the deeds, then the plaintiff insists upon right as heir at law.

The material question is, whether deeds executed by *Richard Benthall*, an old man, in view and contemplation of marriage very much to his own prejudice, and greatly to the benefit of Mrs. *Elizabeth Brown*, the intended wife; shall be established in this court, notwithstanding the marriage never effected; 1050*l.* a debt due from Mr. *Richard Benthall* to *Elizabeth Brown* for some years before, is recited to be the consideration of the following deed of lease and release *October 20, 1718,*

Made between *Richard Benthall* of the first part, *El Brown* of the second part, and trustees of the third and parts; reciting, that *Robert Benthall* was indebted to *El Brown* in 1050*l.* and in consideration thereof, he grants to trustees, and their heirs, to the use of *Elizabeth Brown* for life to trustees to preserve contingent remainders, then as all manors, lands, &c. or such part thereof as she the *Elizabeth Brown* shall think proper, to the use of trustee their heirs, during the life of such person only as she the *Elizabeth Brown* shall, by any writing or writings, execute her in the presence, &c. or by will executed, &c. either wholly or conditionally direct, limit, and appoint in trust such person, &c.

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And for want of such appointment as aforesaid, to the *Thomas Wild* his executor, &c. for the term of 500 years, out impeachment of waste, subject to the provisos, p &c. herein after declared concerning the same; and from after the expiration, or other sooner determination of the

years term, to the use and behoof of the heirs of the body of the said *Elizabeth Brown*; and for want of such issue, then to the use of such person and persons, his, her, or their heirs, for such estate and estates, and in such manner as the said *Elizabeth Brown*, whether sole or married, and with or without the consent of any husband she shall happen to have, shall, by any writing, &c. or by will or writing purporting a will, direct, limit, and appoint, and chargeable with any sum, &c. not exceeding 1000 *l*.

And it is agreed by and between the said parties, that all and every appointment made by the said *Elizabeth Brown*, by virtue of the powers in this deed, may *from time to time be revoked and a new appointment made.*

And for want of such appointment, then to the use of the said *Elizabeth Brown*, her heirs and assigns for ever.

A power to *Elizabeth Brown* to sell the premises to pay incumbrances.

A general warranty by Mr. *Richard Benthall*, who covenants that he is seised in fee, has full power to grant, that Mrs. *Brown* and her heirs shall peaceably enjoy; that the premises are free from incumbrances, except a mortgage of 1200 *l*. and the recognizance of 1000 *l*. and that he will at his own expence do further acts to assure.

The term of 500 years is declared to raise portions out of the estate for the younger children of the said *Elizabeth Brown*, not exceeding 1000 *l*.

The deed of appointment of *November 3, 1718*, recites the powers created by the foregoing settlement in the first place, and then follows the appointment.

"Now know ye, that I the said *Elizabeth Brown* in pursuance of, &c. do by these presents, &c. appoint, limit, give, and grant all and singular the said manor of *Benthall*, and all and every the lands, &c. and the reversion and reversions thereof, expectant upon my death, in case I shall die before my inter-marriage with the said *Richard Benthall*, to hold to him the said *Richard Benthall*, his heirs and assigns for ever, subject nevertheless, and upon this express condition, that the said *Richard Benthall*, his heirs or assigns, shall, within the space of 12 months next after my decease, pay to my brother *John Brown* the sum of 300 *l*. to *Ralph Brown* 200 *l*. and to *Mary Brown* 200 *l*. but in case the said *Richard Benthall* shall marry me the said *Elizabeth Brown*, then I do hereby declare the appointment and all and every thing contained therein shall be void."

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The second deed of appointment bears date *March 11, 1719*, recites the lease and release, and the foregoing appointment, and then follows,

"Now know ye, that I the said *Elizabeth Brown*, for good and valuable consideration me hereunto moving, and in execution and performance of the said power reserved to me in and by the said in part recited indenture of release, and also in execution and performance of all and every other power,

" &c.

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BROWN.

“ &c. reserved in and by the said indenture, or otherwise; I
“ the said *Elizabeth Brown*, by these presents, under my hand
“ and seal, by me attested in the presence of *J. M. C. M.* and
“ *El. B.* do appoint, limit and direct all and singular the manor,
“ &c. in the said recited indenture, shall, from and after the
“ decease of me the said *Elizabeth Brown*; be had, held, and
“ enjoyed, &c. unto and to the use of the said *Richard Benthall*
“ for his life: And I do by these presents assign and set over all,
“ &c. to the said *Richard Benthall*, and his assigns, for the term
“ of his natural life, and from and after the several deceases of
“ me the said *Elizabeth Brown*, and the said *Richard Benthall*,
“ then to the heirs of the body of me and the said *Richard*
“ *Benthall*; and for want of such issue, to the use of my brother
“ *John Brown*, and the heirs of his body; and in default of
“ such issue of *John Brown*, the like limitation to *Ralph Brown*;
“ and in default of such issue of *Ralph*, the like limitation to
“ *Mary*, with remainder to such persons as *Elizabeth Brown*
“ should appoint, with a power of revocation by the said *Eliza-*
“ *beth Brown*.”

A stated account between *Richard Benthall* and *Elizabeth Brown* with relation to the 1050*l.* produced by the defendant, and not controverted by the plaintiff.

Elizabeth Brown levied a fine in *Trinity* term 8 *G.* 1. two years after the death of *Richard Benthall*, and declared the use of it to herself and her heirs.

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In 1735, long after the fine, was the present bill filed.

To this *Elizabeth Brown* pleaded a purchase for a valuable consideration, which was over-ruled, and she was ordered to answer.

After the plea was over-ruled, *Elizabeth Brown*, in *Easter* term 1737, suffered a common recovery, in which she comes in as vouchee, and declares the use of it to herself in fee.

This being the state of the case, the plaintiff prays that, as she is heir at law of *Richard Benthall*, the court either upon the foundation of her having the legal estate will decree the possession to her, or that the deeds may be set aside on account of fraud and imposition.

LORD CHANCELLOR,

First, As to the plaintiff's legal right to the estate in possession.

Secondly, if she has no such legal right, then whether she ought not to be relieved on the point of fraud and imposition.

Thirdly, if there is no fraud or imposition, whether she ought not to be relieved on the suggestion of mistakes and blunders in the drawer of the deeds, contrary to the intention of the parties.

There has been one general objection made against this bill that the plaintiff ought to be left to her remedy at law by ejectment.

L

In the first place the plaintiff is heir at law, and where she cannot protect herself by shewing her title, as the deeds and writings are admitted to be out of her hands, she may properly be into this court.

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Where persons cannot shew a title at law, by the writings being out of their hands, they may properly come into this court.

A second reason for the bill is the applying by way of redemption, for this estate is allowed to be incumbered with 700*l.* therefore she was regular in coming here to compel defendants to take their money.

A third reason, that the charge of 700*l.* is by way of condition that the heirs do pay within 12 months, &c. now as the condition is broken by the 700*l.* not being paid within 12 months, &c. I doubt they could not prevail at law.

As to the merits of the title at law it depends upon two points:

First, Upon the effect of the deed-poll of the third of November 1718, out of which several points arise.

Secondly, What is the effect of the acts subsequent to this deed-poll of the third of November 1718, and also what kind of title *Elizabeth Brown* took under the indenture of lease and release of the 20th of October 1718.

She took an estate for life with a remainder in tail, &c. *Vide* words of the deed itself.

As to the appointment under the deed-poll of the third of November 1718, it certainly was a good appointment of the remainder in fee expectant upon her estate-tail.

The next thing to be considered on the deed-poll is, whether the conveyance only operated out of her power, or out of her estate also (1).

And it is necessary for this purpose to consider the words of the deed.

Now know ye, that the said *Elizabeth Brown* in pursuance &c. doth by these presents, &c. appoint, limit, give and sell all and singular, &c. and the reversion, &c. in case I shall before my intermarriage with the said *Richard Bentball*, to him the said *Richard Bentball*, his heirs and assigns for

by the words of the deed it is confined to some power; it is therefore nothing passed by this deed in point of law, but the remainder in fee, and her estate-tail remained undisturbed, not touched by the power: now she does not only limit and appoint, but she gives and grants; consider then whether she can take effect out of the interest abstracted from the power. In the first place there is no consideration, in the next place none, and therefore there is no way of supporting it but to make it operate by way of release to *Richard Bentball*, as being in possession. *Co. Litt. sect. 460. p. 270. b.*

) *Vide Sir Edward Clere's case, 6 Co. 18. a. Har. Co. Litt. 112. a. n. 1.*

If

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If tenant in tail,
remainder in fee,
grants an estate
to A. to com-
mence after the
death of tenant
in tail, and then
levies a fine to other uses; A.'s estate is merged in the fine.

If taken upon this foot, it will be sufficient to create a fee to Mr. *Benthall*, voidable by the issue in tail; for if in tail, remainder in fee, grants any estate to A. to commence in possession after the death of tenant in tail, and afterwards levies a fine to other uses, the estate of A. is merged in the fine. *Vide Symonds versus Cudmore, Salk. 338 (1).*

The question then will come to this, whether the grant to *Richard Benthall* can amount to a conveyance in possession. I think it cannot, for it was intended only to take effect after death, and not to pass any estate in possession.

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The next question will arise upon the acts which were subsequent to the deed-poll.

The first transaction was the deed of the 11th of *March* being an appointment to new uses.

A strong objection has been made on the part of the plaintiff that it is entirely void, because *Elizabeth Brown* had made the former appointment without reserving a power of revocation; and for this purpose the case of *Heli* versus *Bond* has been much relied on as the governing case*.

The decree in *Heli* and *Bond* on appeal to the house of Lords was affirmed by the unanimous opinion of the Judges of the Common Pleas, and Exchequer.

But I am very doubtful whether that case will govern the present, though I inclined at first that it would. This case was heard before Lord *Harcourt*, who had it stated for the opinion of the Judges of the court of King's Bench, and on an appeal to the house of Lords, the decree was affirmed by the unanimous opinion of the Judges of the court of Common Pleas, and of Exchequer.

In the present case here are two powers in the very creation: a power to appoint uses, and a power to revoke uses: no power to appoint uses, *Elizabeth Brown* has executed by deed of the third of *November* 1718, but the power of revocation has never been executed at all till the deed of the 11th of *April* 1719; then the question will be, whether both might be executed once, as they seem to be distinct and separate powers. In *Heli* and *Bond* the power of revocation was executed; the doubt was, whether the uses could be revoked *toties quoties* without reserving a power of revocation.

* A man makes a settlement, wherein was a power from time to time to the uses and to limit and declare new uses; in pursuance of this power he revokes old uses, and by the same deed limits new, without annexing any new power of revocation to those new uses; afterwards, thinking he had by the first settlement of revocation *toties quoties*, he by another deed revokes the last, and again declares uses of the same lands.

It was decreed that his power of revocation by the first deed was executed, and, and by consequence that the revocation afterwards was without any warrant: the uses limited on the first revocation must stand. *Eq. Ca. Abr. 342 (2).*

(1) But if tenant in tail conveys to one during his own life or covenant, to stand seised to the use of himself for life, with a remainder over, this remainder it seems is void in its creation. See *Machell v. Clark, 2 Salk. 619, 620.*

(2) *Pre. Cha. 471. S. C. See 12 E. 1 Co. 173. a. b. Jones v. Maitland 1 Vent. 198. Tynham v. Webb, 211. Lamb v. Woolston, 2 Burr. 11*

here is no occasion to give a determinate opinion on this
t; for even supposing the uses of the deed in *March* 1719,
old, I think the uses of the deed in *November* 1718, are well
aid by the recovery in 1737.

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What is the consequence of the fine? Why she has barred her
tail by virtue of the statute of 4 *H.* 7. and likewise discon-
tinued the remainder in fee.

It is still stronger, if you consider the deed of *November*,
, as operating only out of her power according to *Symonds*
s *Cudmore*, 1 *Salk.* 338 (1). [201]

The next consideration is the recovery; I am of opinion that as
remainder in fee was discontinued by the fine, so it was well
aid by the recovery.

It was made a question 150 years ago, whether, if tenant in
remainder in fee, levied a fine, a common recovery would
barred the fee. *Cro. El.* 388. *Barton versus Lever.* *Poph.*
But this point is now fully settled, and there is not so much
scintilla juris remaining to the issue in tail (2).

A doubt 150
years ago; but
is now settled,
that if tenant in
tail, remainder
in fee, levies a
fine, a common
recovery bars
scintilla juris.

the fee, and the issue in tail have not a *scintilla juris*.

Supposing it possible the deed of the third of *November*, 1718,
intended to take effect out of the interest; I think it would
aid, because it is not to take effect in possession till after her
, and the consequence of this is that she remained tenant in
tail with remainder in fee to *Richard Benthall*, and so was barred
the recovery.

Another point to be considered, which is as to the effect of
the fine.

Is it to be a fine, with proclamations and non-claim.

In the deed of appointment in *November* 1718, in case *Eliza-
Brown* did not marry *Richard Benthall* in her life-time she
was him tenant in fee; he dies, she enters and gains a pos-
session by abatement, levies a fine, and five years past; consider
whether the plaintiff by this means is not effectually barred
of her legal right.

The counsel for the plaintiff have founded their relief in
upon three grounds.

First, On account of fraud and imposition.

Secondly, that as this deed was made in view of marriage, as
it was not taken effect, it is consequently void.

Thirdly, Upon the mistake and misapprehension of the drawer
of the conveyance, contrary to the design and intention of the
party conveying.

As to the first, *fraud and imposition*; here is no proof in the
case of actual fraud: it appears in evidence that *Richard Ben-
thall* was a man of very good understanding, and likewise bred to

If the deed of the 3d of Nov. 1718, then the fine would have corroborated the
been considered as operating upon the state of the grantee. *Seymour's case*, 10.
year of Mrs. *Brown*, so as to pass a 96. a.
for determinable by the issue in tail, (2) See 2 *Cruise*, 200, 201.

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the law; that he did not rashly and precipitately engage in this deed, but took three days to consider, and give instructions about this settlement: neither is there a syllable of proof, that Mrs. *Elizabeth Brown* herself used any art to impose upon him, or to draw him in to execute this deed in her favour.

If there is no proof of actual fraud, then consider the circumstance of fraud arising from the internal evidence in the deeds themselves; now it must be admitted that there are such marks of fraud upon the face of it, as may justly create suspicion in any court whatever: it cannot be called a purchase, because 1050*l.* the pecuniary consideration, is by no means equal to the value of the estate; but then the question will be, whether this objection may not be answered by the apparent intention of Mr. *Richard Bentham*, that the whole estate should pass to her in possession in his life-time, which is manifest from his declarations both before and after the execution of the deed.

It is no ground for a court of equity to set aside a deed, that a person put an unguarded confidence in another.

That a person puts a groundless and unguarded confidence in another, is not a foundation in a court of equity to set aside a deed; but it is plain that she had an equal confidence at least, for it appears in the cause that she trusted him for a long time with 1050*l.* of her money, without taking so much as a note of hand, or any other security whatever.

The second ground of relief is that as the deed was made in view of marriage, which never took effect, the deed is consequently void.

This court will not judge according to strict rules of law, on a gift of lands *causa matrimonii prælocuti*.

Though the consideration is not expressed in a deed, yet if the court sees what was the material consideration, it has great weight, notwithstanding the statute of frauds.

The law of *Scotland* on this point is, *Causa data non secuta*, like an exchange between parties, if not executed on one side, it is void on the other: but I do not think I am to judge here according to the strict rules of law with relation to a gift of lands *causa matrimonii prælocuti* (1).

It is objected by the defendant's counsel, that to go upon this ground of relief, *the marriage not taking effect*, would be contrary to the statute of frauds and perjuries, because here is no consideration of marriage expressed in the deed itself; but there are many cases in this court where though *the consideration* is not expressed in a deed, yet if it appears to the court, what was the real and material consideration, it has had great weight with the court notwithstanding the statute of frauds and perjuries (2).

But the strongest part of the defendant's case is, that though there was a marriage intended, yet this deed was not to be the marriage settlement, but if the marriage took effect a new one was to be executed, and it appears in proof that this was the design.

(1) It is observable, that if a woman in consideration of marriage gave lands to her intended husband, and the marriage did not take effect, then the woman was intitled to her writ of *causa matrimonii prælocuti*. But on the other hand if a

man had given lands to a woman on the like occasion, she would have been intitled to the lands, tho' the marriage did not take effect. *Fitz. N. B.* 471, 472.

(2) See *Lloyd v. Spillet*, ante 150.

however absurd the intention of this deed seems to be, yet *th Brown* might provide for all the uses of the marriage ent under it, if she thought fit.

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third ground of relief is, mistakes and misapprehensions in the drawer of the deeds contrary to the design of the

Mistakes and misapprehensions in the drawers of deeds, are as much a head of relief as fraud and imposition.

to be sure this is as much a head of relief as fraud and imposition (1), and under this head it is insisted on, that the deed was intended only by way of mortgage or security; but, on going into it, nothing of this kind appears upon the face of it; any thing that has at all the air of it, is the stated account of the same date with the lease and release *October* the 20th,

But I am of opinion this was only done with regard to 50*l.* and to create an evidence of the debt.

The next thing insisted on in behalf of the plaintiff is, that the construction of the deed of *October* 20, 1718, should be such, which the defendant endeavours to put upon it, then it is not so much as an estate for life given to *Richard Bent* before the marriage, which is always usual in marriage settlements.

So to take this to be a blunder in the drawer of this conveyance, and therefore if *Mr. Benthall* in his life-time had gone into a court of equity to be relieved, the court would have done it on conditions; but this is of no consequence to the plaintiff.

The great point for the plaintiff is, that taking the deed-poll of the third of *November* 1718, as part of the agreement, the parties of it have so framed it as to let *Mrs. Elizabeth Brown* have the remainder by the estate-tail being left in her power, and she has taken an undue advantage.

As this has appeared in the cause, I should have been of opinion to relieve; but I must own, after considering the evidence and all the care and circumspection I am master of, I cannot find sufficient proof of an undue advantage: three witnesses fully to *Mr. Benthall's* mind and declarations with regard to his great love and affection for *Mrs. Elizabeth Brown*, and his desire that she should have the whole estate, and that he settled himself so, both before and after the execution of the deed.

It is very doubtful, as the deed of the 20th of *October* 1718 is framed, if *Mrs. Elizabeth Brown* might not *toties quoties* re-voke the uses of any deed: but if she could do the same by a deed, a court of equity will not take the power from her.

Though there is only parol evidence of *Mr. Benthall's* intention that *Mrs. Elizabeth Brown* should do what she thought fit with the estate, yet this is sufficient to rebut an equity: and it is light is like the case of *Standard* versus *Metcalf* before *Talbot*.

The length of time is a material ingredient for the defendant to shew, if it may have prevented her from having the benefit

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(1) *Vide Simpson v. Vaughan, ante 33.*

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fuch evidence as she might have had if the plaintiff had applied sooner for relief.

On the whole I do think there is not any room to relieve upon the several heads of fraud, intended marriage or mistake, or to set aside the deed, and therefore as to this the bill must be dismissed.

But however, I will leave it to the plaintiff's choice, whether she will try the right at law; and if she has a mind to try it, I will give her the assistance of this court in clearing all difficulties by removing the term for 500 years, out of her way, so that she may be able to come at the right.

Cafe 163.

S. C. cited post.

428.

T. D. on his marriage settled his estate on himself for life, on his wife for life, remainder to trustees to preserve, &c. remainder to his first and every other son in tail male, remainder to himself in fee; a son born, the father dies indebted by bond, the son afterwards dies without issue, but by his will devises the estate to the defendant in fee. *Lord Hardwicke held, the reversion being come into possession, was assets to pay the father's debts, notwithstanding the devise of the son (1).*

Kingson versus Clark, Trinity vacation, 1741.

THOMAS Delabay on his marriage settled his estate on himself for life, on his wife for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to himself in fee; there was issue a son; *Thomas* the father died indebted by bond, the son died afterwards without issue, but by his will had devised the estate to the defendant *Clark* in fee.

Lord Hardwicke held, the reversion being come into possession, was assets to pay the father's debts, notwithstanding the devise of the son (1).

LORD CHANCELLOR,

The question is, whether the reversion in fee, which is now come into possession, shall be assets to pay the bond debts of *Delabay* the father.

I am of opinion that this reversion being come into possession is assets to pay the debts of the father, notwithstanding the son has devised it to the defendant.

The defect in 13 *Eliz. cap. 5.* of fraudulent conveyances, is remedied by 3 *W. & M. cap. 14.*

Before the statute of 3 *W. 3. cap. 14.* the heir was not bound by lands descending to him where sold or aliened before action brought, and if an obligor devised his land, the devisee so selling was not liable to the obligee: this statute was to remedy the defect in 13 *Eliz. cap. 5.* of fraudulent conveyances, and to extend it to fraudulent devises.

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First, I will consider whether this case is within the intention of the statute of 3 *W. 3.*

Secondly, whether there are words to explain that intention.

The general view of the act is to prevent creditors from being defrauded of their debts, and to make all devisees equal with the heir where lands descend upon him.

(1) *Giffard v. Barber*, cited, 1 *Ves.* See also *Tweedale v. Coventry*, 1 *Bro.* 175. *Godolphin v. Abington*, ante 57. *Ch. Rep.* 240.

The known rule upon statutes made to prevent frauds is, that they ought to have the most liberal construction, as in *Twine's case**. KINASTON v. CLARK.

There are many cases where the enacting part in a statute extends further than the preamble even in criminal matters, as in an act made in 33 *Hen. 8. cap. 23.* for trying treasons and murders, where the words being within *the King's dominions or without*, it has been extended to trials in *the West-Indies*, and persons have been tried there and executed by virtue of this act.

The enacting part of a statute extends further than the preamble in many instances; even in criminal matters. The 33 *Hen. 8. cap. 23.* for trying treasons, *the West-Indies.*

&c. within the King's dominions or without, has been extended to trials in the *West-Indies.*

It has been objected, that where a preamble is tied up to a particular case, the court will carry it no further, unless there are express words in the enacting part which extend it further (1).

Now in this statute there are two parts of the preamble; and both are not tied up to one case; for the first part is general, and the latter only confined to a particular case.

The heir is as much debtor upon the bond as the obligor, and is laid down in *Plowden* 440. who is more large upon this head than any of the subsequent reporters; an heir must be charged in the debt as well as the detinet (2), and before the statute of jeofails it would have been error if otherwise, which shews plainly the heir is to be considered as a debtor: if judgment go by default against an executor, it can only be *de bonis testatoris*; but if judgment be by default against the heir, it may be against him personally, which is another proof of the laws considering him as a debtor.

An heir must be charged in the debt as well as the detinet, and before the statute of jeofails, it would have been error if otherwise, which shews he is to be considered as a debtor. If judgment be by default against the executor, it can

only be *de bonis testatoris*; but if against the heir, it may be *de bonis propriis.*

* Mr. Murray counsel for the defendant put this case: a son and a daughter by one venter, a son by the second venter, the father dies indebted, the son by the first venter enters, is seised, and dies, the daughter is intitled being a *possessio fratris*, and, said Mr. Murray, she is not chargeable with the father's debts; but I deny his position, for she is plainly liable to the debt.

A son and a daughter by one venter, a son by the second, the father dies indebted, the son by the first enters is seised and dies, the daughter is

intitled, being a *possessio fratris*, and is liable to her father's debt.

The act is to prevent the defrauding the creditors of any [* 206] debts.

If lands had come to an heir in possession, and he had devised them before the writ brought, it is certainly within the statute; why not if it comes to him in reversion? If in the present case

* *Twine's case*, 1 Co. 82. it was resolved in this case by the whole court, that all statutes made against fraud, should be liberally and beneficially expounded to suppress the fraud, and according to their opinions divers resolutions have been made.

(1) See *ante* 1 vol. 174. 182.

(2) *Post*. 434. *Stileman v. Ashdown*, *post*. 609.

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there had been no devise, but the lands had descended to heir of the son, and then the estate-tail determined, and *in infinitum*, they would have been chargeable.

It is an inaccurate expression, to say a reversion after an estate tail is not assets, for there is a liability which makes it assets *in futuro*.

Though the law says that a reversion after an estate-tail not assets, yet it is a gross and inaccurate expression, and is *sub modo*, for there is a liability which makes it assets *in futuro*, or in other words a quality to be liable to the *in futuro*.

The son's recovery would have barred the creditors; a fine would not have done it, for the reversion in fee would still have been liable.

Indeed the son might have suffered a recovery, and be the reversion in fee, and there the father's creditors would have come in; if he had levied a fine only, it would barred the estate-tail, but the reversion in fee would have liable.

This court carries it's power further than the law in cases; for instance, in respect to an advowson in gross, how doubtful it may be at common law, whether it is assets, extendible on an *elegit*, as no yearly value can be put up yet Lord Chancellor King in *Tong and Robinson*, Michael term 1730, decreed it to be sold to pay debts by specialty (

The estate now comes into possession, is liable to the specialty debts of the father, and by circuitry the simple contract creditors are to stand in the place of satisfied bonds.

Upon the whole, I think even at law an action might been maintained against the heir and this devisee, and it pleading is warranted in *Clift's Entries*. I am of opinion that this estate, which is now come into possession, is liable the specialty debts of the father, and by circuitry the simple contract creditors are to stand in the place of satisfied bonds.

(1) 3 P. W. 398. 401. S. C. See also *Westfaling v. Westfaling*, post. 3 vol. 405.

(2) Reg. Lib. A. 1740. fol. 621

See

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Bates versus Dandy, July 16, 1741.

Case 641.

Edward D. who died intestate, left three sisters, his personal estate being agreed to be divided into thirds, two mortgages, one in fee, the other for a term, each for 150l. were allotted to the defendant, one of the sisters; before any assignment, her husband borrowed 200l. of the

DANDY's wife was one of three sisters intitled to her other *John Dyer's* personal estate, who died intestate, administration was granted to two persons; the three and their husbands, and one of the administrators, came to agreement to divide the personal estate in thirds, a third allotted to each: a memorandum under the account was signed by all; two mortgages, one in fee, the other for a term, for 150l. were allotted to *Dandy's* wife, but the legal int was not assigned, but by the memorandum was agreed to assigned: before any assignment, *Dandy* borrowed 200l. of plaintiff on note, and by agreement under hand took note that he had, the better to secure the 200l. left two mortgages

plaintiff on note, and, as a further security, left the two mortgages with him, and gave him promising to assign them, and then dies. Bill brought against his administrator, and against the executor, to be paid principal and interest, or to foreclose. Lord Hardwicke held, that the husband's wife to procure an assignment of the mortgages, amounted in equity to a disposition of them pro tanto, satisfy the plaintiff's debt, which being done, they belong to the wife as her choses in action.

with the plaintiff, which he was intitled to, and promised forthwith to assign them to the plaintiff. Before any thing done, *Dandy* died; the plaintiff's bill is brought against the wife of *Dandy*, against *Dandy's* administrator, and against the mortgagors, to be paid his 200*l.* and interest, or to foreclose the mortgages (1).

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Pierce v. Thom
2 Simons. 16.
Donne v. Ha's

The wife insisted that the mortgages were her *choses in action*, and, not having been assigned by her husband, survived to her, or least that she was intitled to them on paying the plaintiff.

2 Russ. & M. 36

The administrator of the husband insisted, that in equity what *Dandy* had done amounted to an assignment, and that he was intitled to redeem the plaintiff.

Pardew v. Jack

1 Russell. 1.

Honner v. Mot

3 Russell. 65.

LORD CHANCELLOR,

The agreement amongst the three sisters, and separating the mortgages from other parts of the estate, was an appropriation of the mortgages to *Dandy* and his wife, and *Dyer's* heir and administrator were trustees for *Dandy* and his wife in the two mortgages. Secondly, That *Dandy* being intitled, in right of his wife, to the trust of these mortgages, he had a power to assign them for his own use. Thirdly, That leaving them with the plaintiff, and giving his note, promising that he would procure them to be assigned, amounted in equity to a disposition of them for so much as to satisfy the debt to the plaintiff, but not more; for though he might have disposed of the whole in the manner he did, his intention was only to secure the plaintiff's debt, which being done, they belong to the widow as her *choses in action*, and not to the husband's administrator.

Bank v. Burg

2. Collyer. 22.

Lancaster

10 B. & C. 15.

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Although one of the mortgages was in fee, it made no difference: if a bond be given to a feme sole, who afterwards marries, the husband and wife must join in the action, and both must recover; but if a bond be made to the wife subsequent to her marriage, the husband alone, without the wife, may bring the action and recover.

If a bond be given to a feme sole, who marries afterwards, the husband and wife must join in the action; otherwise, if made to the wife after

marriage, the husband alone may bring the action and recover.

(1) *John Dyer* made his will and bequeathed the *residuum* of his personal estate to his brothers and sisters *Alexander* and *Lawrence Dyer*, *Sarah Dandy* and *Ann Dyer*. Administration to *John Dyer* was granted to *Alexander* and *Sarah*. *Alexander* died leaving his widow *Concatrix*, and a son, whereby the legal estate in the above noticed mortgage for the term, vested in *Sarah* as surviving administratrix to *John*, and the legal estate

in the mortgage in fee vested in the son of *Alexander* as heir at law to his father and *John*. The transactions with respect to the mortgage to *Bates &c.* were had as above reported. His Lordship decreed, that in default of payment by *Sarah* at the time therein mentioned, the mortgage was to be foreclosed, and *Sarah* and the heir at law of *Alexander* were to assign the mortgages to *Bates*. Reg. Lib. A. 1740. fol. 408.

Regis v. De Carter

O 2

That

14. Reg. v. 445.

A husband may assign the trust of the wife's term, unless it be a trust from himself for the wife's benefit;

That as the husband may assign the wife's term, so he may the trust of the wife's term (1), unless it be the trust of a term from him for the wife's benefit; he may likewise dispose of the wife's mortgage in fee, as well as her mortgage for a term.

A husband may assign a wife's possibility, if it be for a valuable consideration, but he can release the bond without receiving any part of the money.

The husband may assign the wife's chose in action, or a possibility that the wife is intitled to, as well as her term, so that it be not voluntary, but for a valuable consideration (2); but though he cannot dispose of her chose in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money.

The cases that have been cited of *Theobalds versus Deffoe*, and *Packer versus Windham*, *Prec. in Chan.* 412. consisted of many particular circumstances, and so are not applicable to this case.

(1) So 3 *Cba. Rep.* 223, 224. *Tudor v. Samynes*, 2 *Vern.* 270. *post.* 421. *contra Hard.* 496.

v. Kentish, *ante* 1 vol. 280. *Jewson v. Moulson*, *post.* 417. *Hawkins v. Oby*, *post.* 549. *Cbauncey v. Graydon*, *post.* 621.

(2) *Crouch v. Martin*, 2 *Vern.* 595. *Carteret v. Paschall*, 3 *P. W.* 199. *Grey*

Contra Squib v. Wyn, 1 *P. W.* 378.

Case 165. *Hill versus Adams* (1) on appeal from the Rolls, July 16, 1748

The defendant purchased a real estate of the plaintiff's husband, and the estate being in mortgage for a term, he agreed to pay it off out of the purchase money, and to assign the term

IN 1711, the defendant purchased a real estate of the plaintiff's husband, and the estate being in mortgage for a term, it was agreed that the mortgage should be paid off out of the purchase money, and the term assigned to a trustee for the purchaser to attend the inheritance, which was done accordingly; the husband died in 1719, and 1737 the plaintiff brought her bill against the defendant for an account of profits, and to be paid her dower.

to a trustee for the purchaser to attend the inheritance, which was accordingly done; the husband died in 1719, and in 1737 the plaintiff brought her bill against the defendant, for an account of profits, and to be paid her dower: *Sir Thomas Abney, sitting for the Master of the Rolls, decreed dower for the plaintiff, but Lord Chancellor reversed the decree, and dismissed the bill without costs.*

It was admitted by the defendant's counsel, that the wife may be let into dower against a mortgage and may be let in to redeem for that purpose against a purchaser; but if a purchaser takes in a term prior to the wife's right of dower, whether it be a satisfied term, or money paid for it, it is a bar to the wife's having dower, and, if any thing, the payment of money for the assignment of the term makes it rather stronger; so if a purchaser takes in a mortgage, the same cannot redeem: a term attendant on the inheritance is the inheritance itself: notice to the purchaser of the marriage and right of dower make no

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(1) *S. C. Amb.* 6. under the names of *Swannock v. Lifford*.

difference

ence : a woman cannot be endowed of a trust estate, though husband may be tenant by the curtesy of it.

HILL v.
ADAMS,

was insisted for the plaintiff, that, in the present case, the husband did not join with the mortgagee in assigning the term, and was answered, that the assignment of the term, and the case, was all one transaction, and done at the same time, that the wife cannot be in a better condition against the husband than the husband would have been. Cases cited, *Wray v. Williams*, 1 P. W. 137. *Brown v. Wray*, 700. *Wray v. Williams*, 1 P. W. 137. *Brown v. Wray*, *Preced. in Eq.* 97.

Thomas Abney, in the absence of the Master of the Rolls, decreed dower for the plaintiff; but on an appeal to my Lord Chancellor, he reversed the decree, and dismissed the bill with costs; and said, since the case of *Radnor v. Vandebendy*, it is a settled rule of the court, that if a purchaser took in a precedent to the right of dower, whether it was a satisfied or money paid for it, it was a bar to the wife's dower; if the mortgage had subsisted at the husband's death, the wife might have redeemed, and been intitled to her dower; or if the husband had paid off the mortgage, and taken an assignment of the term to attend the inheritance, and died seised, the wife would have been endowed; but if a purchaser come in after the mortgage is paid off, and the death of the husband, and takes an assignment of the term, that would prevent dower.

Since the case of *Radnor v. Vandebendy* it has been a settled rule, that if a purchaser has taken in a term precedent to the right of dower, whether it is a satisfied one, or money paid for it, it is a bar to the wife's dower; but if the mortgage had subsisted at the husband's death, the wife might have redeemed and been intitled to her inheritance, and

or if he had paid it off, and taken an assignment of the term to attend the inheritance, the wife would have been endowed.

said the term in *Radnor v. Vandebendy* was not a satisfied term, but he thought there was no difference, whether the term was satisfied or not, or whether the purchaser paid for it, but that the latter was most favourable.

Radnor v. Vandebendy is the rule to go by; and it has been always said in courts upon these occasions, they would not go further than that case, nor will I; but I think the present case stronger against dower.

might have been as well at first, if cases of dower and curtesy had been left to common law, but commiseration to dower hath arisen from indulgence to tenants by the curtesy, and the cases are settled and reconciled in *Radnor* and *Vandebendy*, and therefore the term here must be prior to the wife's right of dower (1).

All the cases in relation to the point of dower are settled and reconciled in *Radnor* and *Vandebendy*.

The reader is referred to the following cases on this subject. *Williams v. Lambe*, 3 Bro. Cba. Rep. 264. *Harg. Co. Litt.* 208. a. note 1. *Vide Godwin v. Winjmo's*, post. 525.

Williams v. Lambe, 3 Bro. Cba. Rep. 264. *Harg. Co. Litt.* 208. a. note 1. *Vide Godwin v. Winjmo's*, post. 525.

141. *Radnor v. Vandebendy*, Show.

Case 166.

Michaux verſus Grove, July 22, 1741.

The proteſtant
next of kin are
only intitled to
the profits in caſe
of deſcents, for

THE bill was brought by a proteſtant, next of kin, to have an account of a rent-charge ſettled on the defendant upon marriage, ſuggeſting ſhe was a papiſt.

caſe of a purchaſe or grant by a papiſt, they are void by the ſtat. of 11 & 12 W. 3.

On a demurrer to the relief prayed by the bill, *Lord Chancellor* ſaid, in the ſtatute of 11 & 12 W. 3. c. 4. intituled, An act for the preventing the growth of popery, there are two clauſes in the fourth ſection.

The firſt part reſpects *deſcents*.

The ſecond reſpects *purchaſes*.

It hath been ſettled that the proteſtant next of kin are only intitled to the profits in caſe of deſcents, for in the caſe of purchaſe or grant by a papiſt, they are utterly void by the ſtatute, and therefore allowed the demurrer.

Mr. Attorney General ſaid, in the caſe of *Hill v. Filkin*, 2 Wms. 9. *Lord Maccleſfield* was of opinion, that a deviſe to an infant papiſt, if he was of ſuch an age as was capable to profeſs the popiſh religion, was a void deviſe, for taking by deviſe is a taking by purchaſe (1): but *Lord Chancellor King* held, if ſuch deviſee did conform at eighteen, that was ſufficient.

(1) *Roper v. Ratcliffe*, 2 P. W. 9. 3 P. W. 46. 1 Bro. P. C. 450

Case 167.

Anonymous, July 24, 1741.

There is no
inſtance of a
ne exeat regno
being granted,
where it is not
a mere equitable
demand, except
where a wife
ſued in the ſpi-
ritual court for
alimony, and
out of compaſſion
to her it was granted.

A Motion for a *ne exeat regno* upon a bill filed by one who had brought an action at law on a marriage contract, and recovered a verdict the laſt ſittings for conſiderable damages, the defendant threatening, that before the plaintiff could have final judgment, ſo as to take out execution, which was within four days, in the next term, he would leave the kingdom.

and the husband threatened to leave the kingdom, and to ſue that court, and out of compaſſion to her it was granted.

Lord Chancellor upon a former motion ordered precedents to be ſearched, and it came on this day again, when ſerjeant *Kathby*, counſel for the plaintiff, cited *Read v. Read*, Ch. Ca. 115, where ſeveral other caſes are mentioned.

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This bill is merely for a *ne exeat regno*, on which no decree can be made, and if I was to grant the motion, I muſt diſcharge it upon the defendant's putting in bail, which the plaintiff might have had when he brought his action, upon an application to a judge at his chambers, and an affidavit of ſpecial damages, though generally in ſuch actions bail is not requiſite; a *ne exeat regno* hath been granted only in a ſingle inſtance, where a wife ſued in the ſpiritual court for alimony, and the husband threatened to ſue that court, and out of compaſſion to her it was granted.

ened to leave the kingdom, and was done out of compassion to her, and to aid that court (1); there is no other instance of its being granted where it is not a mere *equitable* demand (2); his Lordship denied the motion.

ANONYMOUS.

(1) So *Amb. 76. Vide Coglar v. Coglar, Vef. junr. 54.*

(2) So *Pearne v. Lisle, Amb. 75. Atkinson v. Leonard, 3 Bro. Cha. Rep. 218. Parker v. Appleton, 3 Bro. Cha. Rep. 427.*

The Drapers Company and others versus Davis, July 23, 1741. Cafe 168.

THIS cause was set down to be heard on the Master's report; and the point for Lord Chancellor's consideration was, whether interest should be allowed (upon the several liquidated sums under a former report, dated April 13, 1713, thereby stated to be due for the arrears of an annuity given under the will of Sir William Boreman, to John Boreman) in favour of Thomas Harding, as the administrator of John Boreman, who died as long ago as December 4, 1696.

*See Booth
Liquor
1 Ann. 2.
perkins v. Gon
3 Russell 30*

LORD CHANCELLOR,

There is no certain rule of the court for giving of interest on arrears of an annuity; the first instance of its being done in this court, was in the case of *Ferrers versus Ferrers, Caf. in Eq. in Lord Talbot's time, p. 2.* but it hath been done in many instances since, and for the most part where it was the bread of the wife or child (1).

In respect to arrears of an annuity, there is no certain rule of giving interest; the most frequent instances are where it was the bread of a wife or child.

A distinction has been made when it arises upon a contract, and where it was voluntary, but that is not a good distinction, for if an annuity be given by a will for the education and maintenance of the annuitant, the Court will do it: in the present case it was given to him that was heir at law to the devisor, till he attained his age of 24 years, he died before that age, and the annuity was paid for great part of the time the annuitant lived, but at his death there was about seven hundred and seventy pounds due; and on the report for further directions, this day his Lordship gave interest from the time that the report of 1713 was confirmed (2), which was twenty-eight years, and this in favour of the representative only of the annuitant, Thomas Harding.

The Court gave interest on the arrears of an annuity, from the time a Master's report was confirmed, which was 28 years, in favour of the representative of the annuitant only.

Lord Hardwicke said, the Court often decrees interest from the time the demand was liquidated, though the debt did not carry interest in its own nature, but he would not carry the interest any higher than as above directed in the present case.

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Interest is often decreed from the time the demand was liquidated,

tho' the debt did not carry interest in its own nature.

(1) See *Newman v. Auling, post. 3 vol. 579.*

Brewers' Company, ibid. 377. Perkins v. Baynton, 1 Bro. Cha. Rep. 574. Crescy v. Lowth, 4 Bro. Cha. Rep. 157.

(2) *Vide Brown v. Barkham, 1 Cox's P. W. 653. note 1. Attorney General v.*

The DRAPERS'
COMPANY
v. DAVIS.

And in consequence of this opinion, his Lordship ordered Master to compute interest upon the liquidated sum reported by the report of the 13th of April, 1713, for the arrear annuity given by the will of Sir William Boreman to *Joan*, at the rate of 5 l. per cent. per ann. from the 21st 1713, and that *such interest* be added to the principal ported due for the arrears of the said annuity.

Case 169. *Attorney General versus Davy, in the Vacation of Trinity Term, 1741.*

S. C. cited 1 Vesf. 419.

Where a certain number are incorporated, a major part of them may do any corporate act, though nothing be mentioned in the charter.

KING Edward the Sixth, by charter, incorporated persons by name, to elect a chaplain for the church of *Kirton*, in *Lincolnshire*, and by another clause three of them were to chuse a chaplain to officiate in the church of *Sandford*, within the parish of *Kirton*, with the consent and approval of the major part of the inhabitants of *Sandford*.

The King v. A. B. C.
159.
Upon a late vacancy, two of the three chose a chaplain; the third dissented; and the question was, Whether this was a valid choice.

LORD CHANCELLOR,

It cannot be disputed, that wherever a certain number are incorporated, a major part of them may do any corporate act if all are summoned, and part appear, a major part of them may do a corporate act, though nothing be mentioned in the charter of the major part.

It is not necessary that every corporate act should be under the seal of the corporation.

This is the common construction of charters, and opinion that the three are a corporation for the purpose of appointing, and that the major part of them may do any corporate act; this was a corporate act, and the choice too confirmed, and consequently not necessary that all the three join; but if the act to be done by a select number of them had been by a different charter, it would have been otherwise; it is not necessary that every corporate act should be under the seal of the corporation, nor did this need the corporate seal (1).

(1) *Vide Attorney General v. Scot, 1 Vesf. 413. Amb. 82.*

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Taylor versus Allen, October 29, 1741.

Case 170.

A wife, who was an executrix, restrained from getting in the assets of a testator, her husband

A Motion was made for an injunction to restrain the defendant from getting in the assets of her testator, a receiver to be appointed.

being in the *West Indies*, and not amenable to the process of this court.

The testator made the defendant, who was a feme covert, his executrix, the husband being then in *England*; but, at the death of the testator, the defendant's husband was in the *West Indies*.

TAYLOR v.
ALLEN.

An affidavit was read on the part of the plaintiff, in which the deponent swears, that he has heard and believes the husband of the executrix is in very indifferent circumstances, and not a responsible person.

The defendant, in her affidavit, admits her husband may owe debts to tradesmen, but, in other respects, is not in bad circumstances.

LORD CHANCELLOR,

There are several instances where this court have interposed to prevent an executor from getting assets of a testator into his hands upon particular circumstances; and this is one of these cases; for the husband being in the *West Indies*, and not amenable to the process of this court, the plaintiff can have no remedy, if the executrix should waste the assets, or refuse to pay, because the husband must be joined in the action.

The affidavit, besides, on the part of the plaintiff, is very sufficient to induce this court to appoint a receiver, who may collect in the assets of the testator, and who likewise may be empowered to bring actions in the name of the executrix for recovery of debts due to testator's estate; but then the receiver must give sufficient security to indemnify the executrix and her husband on account of such actions brought; and gave directions accordingly (1).

A receiver appointed to collect in assets, and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions.

(1) *Reg. Lib. B. 1741. fol. 27. See Harbortbwaits v. Russell, ante 126.*

Sir William Stanhope versus Roberts, Executor of Spinks, October 29, 1741.

[214]
Case 171.

A Bill was brought to set aside an annuity granted by the plaintiff to *Spinks*, upon a suggestion of its being obtained by fraud, extortion, &c. and to discover the real consideration given by *Spinks* for the annuity, and that the draft of the annuity, suggested to be in the hands of the defendant, might be produced at the hearing.

Counsel have a right to drafts as precedents, but not to detain them, where either party may have a benefit from the inspection of them.

The defendant is the executor of *Spinks*, and a gentleman at the bar, and was the counsel who drew the draft of the annuity, and who admits, by his answer, he had it in his custody, and submits to produce it as the Court shall direct, and does not insist on any privilege as a counsel.

Philip J. Keble
Henry J. Mordaunt
11 C. 27. 425.

The motion was to produce the draft upon oath before a Master, or to leave it with the defendant's clerk in court for the inspection of the plaintiff.

Richard v. Hobbs
P. B. Mordaunt
1 De B. & A. 12.

LORD CHANCELLOR,

Two objections have been made to this motion.

First, To the nature of the case.

Secondly, With respect to the merits of the case.

As

STANHOPE V.
ROBERTS.

As to the nature of the case, it was said, that a counsel is privileged so as not to be obliged to produce a draft, because it is his own property, and he has a right to keep it; but in this case Mr. Roberts is a party concerned in interest, which differs it from the common case of a counsel; he is executor, of the annuitant, and stands in his place, and, by his answer, has submitted to produce the draft as the Court shall direct; and every body knows such a submission will oblige him to do it even before the hearing, if the court shall think it necessary.

Counsellors have a right to drafts, to make use of them as precedents only, but not to detain them, when either party concerned may have any benefit arising from an inspection of them.

A demurrer to a bill for the discovery of a case which the defendant had stated to his own counsel for an opinion, over-ruled.

There was a stronger case in Lord Chancellor King's time, upon a bill brought, among several other things, for a discovery of the case, which the defendant had stated to his own counsel for an opinion, and also for a discovery of the several facts contained in the case.

The defendant demurred to such discovery.

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Which demurrer Lord Chancellor King over-ruled; and upon an appeal to the House of Lords, the order of the Chancellor for over-ruling the demurrer was affirmed.

As to the merits of the case, I do not find any particular circumstance to shew it would be any ways prejudicial to Mr. Roberts to produce the draft.

His Lordship ordered the draft to be left with the defendant's clerk in court, but not upon oath, to be inspected by the plaintiff.

Case 172.

Farnham versus Phillips, October 24, 1741.

S. C. post. 523. cited.

Where, after making a will, a father advances a child with a portion, as great or greater than the legacy, such provision has always been held an ademption; but when the devise has been of a residue, no instance where a subsequent portion has been held to an ademption.

A. B. a freeman of London, having a wife and six children by his will gives his wife her widow's chamber, and the third of his estate, which she was intitled to by the custom of London, and to his six children one other third, which they were intitled to by virtue of the custom of London; and as to the third, he had a power to dispose of, he directed a debt of one hundred pounds to be paid out of it, and the residue to be equally divided among his wife and children.

After making his will, he married one of his daughters to the plaintiff, and gave her one thousand pounds, which, in the marriage-articles, was called her portion or provision; and A. being now dead, this bill was brought by the husband and wife for their seventh part of their testamentary third. For the defendants, the other children, it was insisted, that the portion was a satisfaction for the whole, and that as they did not choose to bring the thousand pounds into hotchpot, to make all the children equal, they ought not to claim this thousand pounds (wh

(which was more than their share of the testamentary third, the whole estate being but ten thousand five hundred pounds) and the share of the testamentary part too, by which they would have two hundred and ninety pounds more than the other children; that the will intended an equality among all the children, and as they refuse to bring in this thousand pounds, they claim under the will, as far it makes for them, and against the will, when 'it makes against them, which equity will not permit.

Parol evidence was offered to prove that the father, after giving the thousand pounds portion, had often declared that all his children should have an equal share of this estate.

LORD CHANCELLOR,

That evidence cannot be read, being to explain a will by matter extrinsic to it, which would introduce great uncertainty in the construction of wills; and therefore such evidence has often been refused to be read (1).

As to the case itself, I cannot make the childrens' portions equal by any rule of equity.

Where a father, after making his will, advances his child with a portion, as great or greater than the legacy given by the will, such provision has always been held an ademption (2).

But there is no case where the devise has been of a residue (that is uncertain, and at the time of the testator's death may be more or less) in which a subsequent portion given has been held to be an ademption; here this is not a devise of one third, but of a residue after payment of a debt charged on that third.

And here is likewise something, to which this portion may be properly applied as a satisfaction, viz. the orphanage part.

And he calls this a portion or provision in the marriage-articles, which seems as if he then considered this as an advancement in his life-time, in bar of the custom.

There is no declaration in the will that he intended all equal, but what he has said of equality is of the residue, which is a part of the estate remaining, after what is given away in the testator's life-time.

Lord Hardwicke directed an account to be taken of the personal estate of the testator, Michael Phillips, and also of what is due to Mary Phillips, the testator's widow, for her paraphernalia and widow-chamber, which are to be paid and retained by her, after the testator's debts are paid; and his clear personal estate to be divided into three equal parts, and one third part thereof to be paid to the testator's widow, and one other third part to be divided between and paid to Michael, Thomas, Amy, Mary, and Sarah Phillips, the testator's five children, the plaintiff, Ann

FARNHAM.
PHILLIPS.

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children's
6 Sum: 511
Barry
Boulcher
3. 4 Hall 3;

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Pyen of Oct
5. May 6
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Shankett v. Lin
3 Hare 316.

Lady Styrmen

11 of 4 Augue
2 H. of 10 d. 10
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(1) *Vide Roserwell v. Bennett*, post. vol. 77. *Jeacock v. Falkner*, 1 Bro. Cha. Rep. 296.

(2) *Irad v. Hurst*, 2 Freem. 224. *Hale*, 2 Cha. Rep. 35. *Hyskins v. Hurst*, Pre. Cha. 263. *Hartop v. Hurst*, Pre. Cha. 541. 1 P. W. 681.

S. C. Jenkins v. Powell, 2 Vern. 115. *Scotton v. Scotton*, 1 Sira. 235. *Englestone v. Grubb*, ante 48. *Taffer v. Chalcroft*, post. 492. On the general doctrine of satisfaction see *Bellasis v. Utbwyatt*, ante 1 vol. 426. note.

FARNHAM v. PHILLIPS.

Farnham, admitting herself fully advanced of her orphan share in her father's life-time; and as to the remaining third, ter the deductions out of it, according to the directions of testator's will, his Lordship ordered the residue thereof to be divided into seven parts, and one seventh thereof to be paid to the plaintiff *Farnham* and his wife, and the other six parts to be equally divided between the defendant, the testator's widow, the five other defendants, her children.

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Case 173.

The wife is not barred of her paraphernalia by a devise of the use of all household goods, furniture, plate, jewels, linen, &c. for life.

A Devise from a husband to the wife of the use of all household goods, furniture, plate, jewels, linen, &c. for life widowhood, afterwards to children and grand-children.

LORD CHANCELLOR,

This does not bar the wife of her paraphernalia (1).

Such a devise intitles her to use the goods any where, or even to let them out to hire.

She may likewise by this devise, use the goods in her own any other person's house, alone, or promiscuously with others, goods, or may let them out to hire.

(1) *Vide Snelfon v. Corbet, post. 3 vol. 369. Graham v. Londonderry, post. 3 vol.*

Case 174.

Strachy versus Francis, November 12, 1741.

A rector may cut down timber for the repairs of the parsonage-house, or chancel, but not for any common purpose.

A Motion was made on behalf of the plaintiff, who was attorney of the living, against the rector, for an injunction to stay waste in cutting down timber in the church-yard.

Bradley v. Strachy
3 Exchequer 558.

LORD CHANCELLOR,

A rector may cut down timber for the repairs of the parsonage-house, or the chancel, but not for any common purpose and this he may be justified in doing under the statute of 35 E stat. 2. intitled *Ne rector prosterneat arbores in Cæmeterio*.

If it is the custom of the country he may cut down wood for any purpose, but if he grubs it up it is waste.

He is intitled to botes, for repairing barns and out-houses belonging to the parsonage.

He may cut down timber likewise for repairing any pews that belong to the rectory; and he is also intitled to botes for repairing barns, and out-houses belonging to the parsonage.

An injunction was granted till the hearing of the cause to the rector from cutting down timber, except in the particular instances before mentioned (1).

(1) The injunction was granted till the hearing to restrain the rector from cutting down, felling, or carrying away timber or other trees, so as to commit any waste or spoil on the premises in

question. *Reg. Lib. B. 1741. fol. 399. See Bradley v. Strachy, Barn. Chb. Rep. 552. Hopkins v. Featherstone, 2 Bro.*

Long versus Burton, November 12, 1741.

Cafe 175.

THE answer to an original bill was reported insufficient, the defendant filed a cross-bill, and the plaintiff obtained an order that the original bill should be answered before he answered the cross-bill; the plaintiff too, on the answer's being reported insufficient, obtained an order to amend his bill, and the amendments to be answered when the exceptions were, and amended his bill in several material matters.

If after a cross-bill filed, a plaintiff in an original bill will amend it in material parts, and thinks fit to compel an answer to the amendments at the same time

with the original bill, he waves his priority of answer to the original (2).

Mr. Chute moved to discharge the order obtained, and relied on the cafe in 2 *P. Williams* 435. *Steward and Roe*.

LORD CHANCELLOR,

By the course of the court, the plaintiff, in the cross cause, cannot have an answer till he has himself answered the original bill; but this is a privilege the plaintiff in the original bill has in right of his original bill; for if after the cross-bill is filed he will amend the original bill in material parts, I do not think he is intitled to have an answer to the amendments; for, as the bill may be amended both in discovery and relief, the pendency of suit, as to those parts which are amended, is only from the time of the amendment.

Where a bill is amended both in discovery and relief, the pendency of suit, as to those parts, is only from the time of the amendment.

The present cafe goes further than the cafe in Mr. *Peere Williams's Reports*, because here the answer to the original bill is insufficient.

The plaintiff in the original bill insists the amended bill is fo tacked to the original, that the defendant is obliged to answer both; but I am of opinion he is not intitled to such an answer, and it might tend to great delay if he was.

The grounds of the order for answering the amended bill are, that by this means the plaintiff saves expence, and has an answer the sooner; for if it was not an insufficient answer, he must have new process to compel an answer to the amendments, but in the present cafe he may take up the old process.

But this is no reason for gaining priority of suit; for if he thinks fit to compel an answer to the amendments, at the same time with the original bill, he waves his priority of answer to the original bill; and there is no inconvenience in this, because the Court can give time generally to answer the cross-bill.

Mr. *Clark*, counsel for the plaintiff in the original bill, said, [219] if we pray time, we shall have an injunction against us.

Lord Chancellor made answer, I cannot help that, you have lost your priority. His Lordship discharged the order (2).

(1) See *Child v. Frederick*, 1 *P. W.* 266. *Steward v. Roe*, 2 *P. W.* 435. *Ratray v. Darley*, post. 3 vol. 724.

(2) *Reg. Lib. B.* 1741. fol. 8.

Wray
Wray
3 *Ann. & 1000*
104
Gray
Gray
12 *Beau* 55

Case 176.

Philpot versus Hoare and Robinson, November 26, 17

S. C. Amb. 480.

A lease for 11 years at 140l. rent, who had covenanted for himself, his executors and administrators, but not assigns, that he would not, without the lessor's consent, assign over the lease, becomes a bankrupt; the defendant Hoare, the assignee under the commis-

sion enters on the farm, sells off the crop and stock, pays the Michaelmas rent 1730, and the day before the day assigns over the lease to Robinson. The bill is brought to oblige Mrs. Hoare to keep the land the term. It appearing in proof that Robinson never ploughed or sowed the land, never resided on the farm, but occupied it rather as an agent. Lord Hardwicke held it to be a fraudulent transfer. Mrs. Hoare and Robinson, and decreed her to answer the rent to the time, and the assignment to be good.

A Lease was made by the plaintiff for eleven years, at rent of 140l. in 1738, lessee covenanted for him executors and administrators, that he, his executors and administrators, but does not mentions assigns, will not, with express consent of the lessor, assign over the lease, and afterwards becomes a bankrupt; the defendant was chosen under the commission, and enters on this farm, being lawfully assigned to her as part of the bankrupt's estate, the crop and the stock, and pays the Michaelmas rent and the day before the next rent-day, viz. on the March, 1740, having received but a little profit from it for this half year, assigns over the lease to the defendant Robinson, subject to the rents and covenants in the lease.

The bill is brought to prevent the assignee of bankrupt assigning the lease, and to oblige her to keep it during the term.

LORD CHANCELLOR,

I am clearly of opinion the defendant shall answer half-year's rent due at Lady-day 1740, the day after the payment, on account of the profits, upon the authority of *1 Vern. 165. Treacle v. Coke* * (1).

As to the accruing rents it is a point of more difficulty the covenant in this lease not to assign, does not run with the land to the assignee, because assignees are not bound by the covenant (2).

* In that case an assignee of a lease rendering rent, having enjoyed it several years, assigned over; the bill was to call him to an account for the rent for the time and Lord Keeper held he was liable in equity for the rent during the time he had the land.

N. B. The counsel alledged there were 20 precedents; and Lord Keeper said, if there had not been one, he should not have doubted to have made one in this case. *E. T. 1683.*

(1) *Vide Valliant v. Dodemede, post.* 546.

(2) Notwithstanding the doubt entertained in the case of *Stanhope v. Skeggs*, cited in *Dougl. 176. n. 20. 2 Term Rep. 134. 140.* I think the cases will warrant the following observations with respect to provisos and covenants not to assign without the consent of the lessor. It is now settled, that the mere act of a lease vesting in an assignee by operation of law, (such as executors, administrators, &c.)

can never be considered as a breach under the proviso or covenant to assign: for if such act of vesting is considered as a breach, the lessor, in fact, determine by the death of the lessee; which could never be to the detriment of the parties (unless so far as is expressed;) especially as the bargain in the lease generally limits it to the lessee, his executors, administrators, and assigns. *Vide Parry v. Herbert Dyer 45. b. 65. b. pl. 8. Crasoe v. Rugby, 3 E.*

covenants which run with the land will bind the assignee, not say this is such a covenant.

Defendant *Robinson's* not producing the assignment shews and makes it very suspicious there is no assignment; yet plaintiff had accepted any rent from *Robinson*, it would bind him to accept him as tenant.

Life of landlords is of very great consequence, and if such chance is allowed to prevail, especially near this town, are in a very bad condition in regard to covenants in

PHILPOT V.
HOARE.

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101.
How

ears in proof, that the defendant, Mrs. Hoare, knew to be insolvent; he is misrepresented in the assignment he is called of *Warburton*, in *Lincolnshire*, grazier, at the time he lived at *Westminster*. He never ploughed or the land, never resided on the farm, but occupied it as an agent; nor do I believe he ever had the assignment ends: taking these circumstances together, it looks like a false assignment. Therefore I shall decree Mrs. Hoare, defendant, to answer the rent to this time, as it is a fraud and satisfaction, and likewise the assignment itself to be set

Long
2 (Philp. v. Hoare)
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at first, an action to be brought in a *damnum factum*, against the defendant, Mrs. Hoare, for the loss of the stock from off the farm: an action of covenant he could not lie, as there is no privity between the defendant and the lessor: but in order to prevent any further litigation, his counsel proposed, that in consideration of paying the plaintiff the rent which is due, the lease for the residue of the term should be void, and the plaintiff take the farm into his own possession which the parties agreed to accordingly.

5. The real question, in these cases seems to be, Whether the alienation of an estate by operation of law, can be a forfeiture? And that depends on the following distinctions.—1st. If the assignment or proviso extends to the land, then an assignee, by law, is bound in it, and he may assign without a forfeiture. *Dyer* 65. b. pl. 8. *Stevens v. Brown*, 1 Cba. Rep. 170. *Stevens v. Fes. junr.* 295. 2ndly, If it is only to the lessee, his executors and assigns, then all of them are bound. *Ree v. Harrison*, 2 Term Rep. 425. In respect to this last rule, as the assignment or proviso does not extend to the land, his executors, administrators, assigns, under a commission of bankruptcy, are not bound by it. *Ree v. Hoare, supra.* *Goring v. Warburton*, 100. pl. 3. which latter

case I have examined with the Register's book, and I find it correct. *Reg. Lib. A. 1724. fol. 145.* 3dly, But if the covenant or proviso expressly names the lessee and his assigns, then it seems, from the words of Lord Hardwicke in the above case of *Philpott v. Hoare*, and from the determination in Sir William Moore's case, *Cro. Eliz.* 26. that all assignees by operation of law are within it. Note, It is said the difficulty in *Stanhope v. Skeggs* arose upon the doubt, whether a clause of restraint could operate upon executors so as to prevent them from assigning land, which was expressly leased to the original tenant, and his executors, *eo nomine*, when that was the only means by which they could exercise their trust. 2 Term Rep. 138. But that difficulty seems to have been done away by the above noticed case of *Ree v. Harrison*.

Case 177.

Buffar versus Bradford, November 27, 1741.

S. C. cited
2 Vef. 28.

A testator having divided his personal estate into eight shares, gave four parts to his niece *Buffar*, and the children born of her body; the plaintiff was born after the will was made, and Mrs. *Buffar* dies in the testator's life-time; this is not a lapsed legacy, for she did not take an estate-tail, but as a joint-tenant with the plaintiff, and as she is dead, he takes the whole by survivorship (1).

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170.

THIS case arose upon the words and construction of the following will :

" As to my household goods, plate, &c. I give one moiety to my sister, *Mary Bradford*, the value of the other half to be placed to the account of my personal estate, yet so nevertheless that she shall have the use of the whole so long as she continues a widow; all the rest and remainder of my estate to be valued; and to prevent disputes, the whole amount of the value of the said estates, whether real or personal, to be divided into eight parts, whereof I give the use of the whole to my sister, *Mary Bradford*, for her support and maintenance during the time she shall remain a widow sans waste, so as the same be divided on her marriage; two 8ths to herself, two other parts thereof to her daughter, my niece *Ann*, and the remaining four parts to my niece *Buffar*, and the children born of her body; but in case my sister remain widow, and her daughter *Ann* marry with her approbation that then her said daughter shall have one 8th part of her fortune, but no more, during her mother's life, until her said mother should marry; and for the other 8th part, which will make up a quarter share, I leave the valuation and estimation of the said estates to be made by my sister, and nephew *John Buffar* to be divided by them; but in such manner, that if any part shall be thought too highly valued, that then such part shall when the time of possession comes, go to Mrs. *Buffar* and her children, because they will have then four of the eight parts. Thus I have, as equally as I thought reasonable, divided my estate for my sister during her life, in case she shall remain widow, without being accountable to any for the income or profits thereof, that she, at her death, may be able to give good legacies to such of her children as shall please her best. I leave also to *John Buffar* and his wife, my nephew and niece, and to their children, for mourning 40*l.* and appoint my sister, *Mary Bradford*, and *John Buffar*, executors."

The bill was brought to have the personal estate of the testator secured, and the deeds and writings.

LORD CHANCELLOR,

The question is, What estate the testator's niece *Buffar* and her children take?

She had no child at the time the will was made, but the plaintiff was born afterwards in the life-time of the testator; the mother of the plaintiff dies in the testator's life-time.

It was insisted, on the part of the defendant, *Mary Bradford*, who had the estate for life, and who is likewise heir at law that it is a lapsed devise, for that the plaintiff's mother took estate-tail, and that *her children* are words of limitation, and of purchase, where the devisee has none at the time of the will made; and therefore, as the plaintiff's mother died before

(1) See the cases cited in the note to *Owen v. Owen*, ante 1 vol. 4

tator, no estate vested in her, and consequently it is a legacy; and for an authority her counsel relied on *Wild's* Co. 17.

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BRADFORD.

the other hand it must be allowed, that children in their import are words of purchase, and not of limitation, it is to comply with the intention of a testator, where the cannot take effect in any other way: but suppose a devise *A.* and after his death to his children, here it is a word of purchase.

Children are words of purchase, and not of limitation, except it is to comply with a testator's intention, and it can take effect no other way.

is been admitted very candidly by the counsel, that as to sonal estate, the children, though born after the making will, must take equally with the mother as joint-tenants; ere a man gives personal estate to *A.* and her children, true the word *children* to be a word of limitation, and purchase, would be a strained and remote construction, ould defeat the children intirely, and the first taker would ll. *Vide Cook v. Cook*, 2 Vern. 545. and *Forth and Chap-* djudged on the same words in Lord *Macclesfield's* time, . 663.

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the time of possession in the present case, which takes it the reasoning in *Wild's* case; for here Mrs. *Buffar* and ldren are to have four eights, and are to take at the same joint-tenants.

will, in this case, confines it to such children as should 1 in the life-time of the testator, and therefore is not o the objection made by the defendant's counsel, that nainder must divide and split as in common marriage ents, where there is an estate-tail to daughters, and one in the life-time of the father, and another after his

Vide the case of *Stephens v. Stephens*, *Cas. in Eq. in Lord me*, 228.

plaintiff, being born in the life-time of the testator, have taken with his mother as joint-tenants, if she ed; as she is dead, he shall take the whole by way of re-
r.

o the other point, whether a legacy given to one of the ors for mourning for himself, his wife and children, . exclude him from the residue, I should think it very o do it, even supposing him sole executor; but as there o in this will and a legacy to one, both shall take the sur- qually, and the executor notwithstanding his legacy of or mourning for himself, his wife and children, is not ex- l(1).

Where there are two executors, and a legacy is left to one, for mourning for himself, his wife and children, he shall have a moiety of the residue notwithstanding.

(1) *Brasbridge v. Woodroffe*, *ante* 68.

Cafe 178. *Reeve and others versus The Attorney General*, November 27, 1741.

S. C. cited
2 Vef. 446.
F. seised in fee of
the estate in
question, devised
it to his wife for
life, and after
her death, to one
Hacon, to sell,
and, in the first place,
to pay debts and legacies,
and the residue to the plaintiffs.
Hacon, who had
bare power, is dead, and,
for want of heirs to F. the
estate is escheated to the
crown. The bill was
brought against the Attorney
General on behalf of the
crown, to have the will
established and estate
sold; the Court of
Exchequer might do this,
as it is a court of revenue,
but it cannot be decreed
here, and therefore the
Chancellor dismissed the
bill.

FULHAM being seised in fee of the estate in question, by his will devised it to his wife for life, and after her death to one *Hacon*, to sell, and out of the profits arising from the sale of the estate, in the first place to pay some legacies, and after debts and legacies paid, to dispose of the residue to the plaintiffs.

Hacon, who had bare power, is dead, and, for want of heirs to *F.* the estate is escheated to the crown. The bill was brought against the Attorney General on behalf of the crown, to have the will established and estate sold; the Court of Exchequer might do this, as it is a court of revenue, but it cannot be decreed here, and therefore the Chancellor dismissed the bill.

Mr. *Hacon*, who had a bare power, and not coupled with an interest, is dead, and for want of heirs to *Fulham*, the estate is escheated to the crown.

The bill is brought by the residuary legatees under the will against the Attorney General, who was made defendant on behalf of the crown, to have the will established and proved, and likewise to have the estate sold.

But here the devise is, after the death of the testator's wife to be sold by *Hacon*, who had only a bare power, and no interest in the estate, and as he is dead, it dies with him, and does not survive to any person.

The question is, Whether an estate, escheated to the crown can be affected with a trust? For this purpose see *Hard. Rq. 469* where there are several cases to this point.

I remember a case in the Court of Exchequer, when I was Attorney General, in which Mr. *Lutwich*, the counsel, was the plaintiff; his father had a mortgage in fee on Sir *William Perkins's* estate, who was attainted for high treason on account of the assassination plot: Mr. *Lutwich* brought his bill to foreclose, and made the Attorney General a party: the Court would not decree a foreclosure against the crown, but directed that the mortgagee should hold and enjoy the mortgaged premises, till the crown thought proper to redeem the estate. *Vide Perw. and The Attorney General, Hard. 465 (1).*

The father of Mr. *Lutwich*, the counsel, had a mortgage in fee on Sir *William Perkins's* estate, who was attainted; the son of Mr. *Lutwich* brought his bill to foreclose, and made the Attorney General a party; the Court would not decree a foreclosure against the crown, but directed the mortgagee should hold and enjoy till the crown thought proper to redeem the estate.

Now I cannot decree the plaintiff here to hold and enjoy, because they are only to have certain sums out of the estate, after debts and legacies are satisfied. Suppose the land had been seised and put in charge, can I make a decree that it should be sold? No, I cannot, but the Court of Exchequer may, as it is a court of revenue: the bill must be dismissed.

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(1) See *Attorney General v. Duplessis*, 2 Vef. 286. *Burgess v. Wheate*, 2 Bla. R.p. 123. *Middleton v. Spicer*, 1 Bro. Cha. Rep. 201.

Powell versus Knowler, at the Rolls, December 1. 1741.

Case 179.

UPON the death of Sir *Thomas Coleby*, the plaintiff came to Mr. *Gilbert Knowler*, the brother of the defendant, and told him that he was positive he could make it out, that he Mr. *Gilbert Knowler*, was the sole heir, or at least a co-heir of Sir *Thomas Coleby*; Mr. *Gilbert Knowler* (it being extremely doubtful at that time who was heir or co-heir of Sir *Thomas Coleby*) declined it, and was unwilling to engage in it; but upon the pressing solicitations of the plaintiff, and upon his offering to defray the whole expence of any suit that should be commenced, Mr. *Gilbert Knowler* listened to the proposal, and executed the following articles of agreement.

Where a person undertakes to make out the title of another to an estate, and is to have a part of the lands as a satisfaction for his trouble, tho' the agreement for this purpose is artfully drawn in order to keep it out of the statutes of champerty, he will not

be intitled to have a specific performance decreed here, but will be left to his remedy at law.

" May the 11th, 1732, Memorandum, A wager was made, and this day entered into, between *Gilbert Knowler*, Esq. and *Francis Powell*, clerk: the said *Gilbert Knowler* wagers with the said *Francis Powell* 4000*l.* that he the said *Gilbert Knowler* is not heir, co-heir, or one of the co-heirs of Sir *Thomas Coleby*, late of *Kensington*; and the said *Gilbert Knowler* doth bargain and promise, with and to the said *Francis Powell*, that he the said *Gilbert Knowler*, his heirs, executors, &c. will pay to *Francis Powell*, his executors or administrators, 4000*l.* so soon as it shall be proved, that the said *Gilbert Knowler* is heir, co-heir, or one of the co-heirs to the said Sir *Thomas Coleby*: and the said *Francis Powell* wagers with the said *Gilbert Knowler* 500*l.* that he the said *Gilbert Knowler* is heir, co-heir, or one of the co-heirs to Sir *Thomas Coleby*, deceased, and this day enters into bond in the penalty of 1000*l.* to pay the 500*l.* to the said *Gilbert*: Item, The said *Gilbert Knowler* doth promise to prosecute suits both in law and equity for recovery of this claim: and the said *Francis Powell* promises to gather necessary evidence together, in order to prove the said *Gilbert's* right: Item, It is also agreed between the said parties, that if the value of the estate and rents recovered by the said *Gilbert* as heir, &c. be less than 8000*l.* the said *Gilbert* shall be obliged to pay the said *Francis Powell* one full half of the value of the estate so recovered: Item, It is also agreed, that the said *Francis Powell* shall take his bond (he has this day entered into to bind himself for payment of 500*l.* to the said *Gilbert Knowler* on the 20th of *December* next) at 500*l.* in part of the sum of 4000*l.* or such less sum as may arise from this wager, according to the foregoing articles, if the said *Francis* wins the said wager: Item, The said *Francis* consents and agrees that the he said *Gilbert* shall, over and above the said 500*l.* deduct and keep back out of the said 4000*l.* or such less sum as shall or may arise from the wager, all such money as he the said *Gilbert* shall have any ways expended, or be

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KNOWLER.

" liable to pay in or about the prosecuting any suit or
" for recovering this claim: *Item*, the said *Francis* conf
" that he the said *Gilbert* shall no otherwise be liable to
" to the said *Francis Powell* the said 4000*l.* or less sum,
" by giving security for it upon the said estate so to be
" vered; and if the said *Gilbert*, or his heirs, is or are r
" to execute any deed or writing, whereby to secure the
" 4000*l.* or less sum, according to this agreement, to
" said *Francis*, or his executors or administrators, by w
" sale or mortgage upon the said estate, or any sufficient
" thereof, within two months after the said *Gilbert* sha
" in quiet possession of the same, then it should be underst
" that the said *Gilbert* has fully performed his part of
" agreement."

To which articles *William Knowler*, the defendant in
present cause, was one of the witnesses, and the said articles
are now in his custody.

Soon after the execution of the articles, *Gilbert Knowler*
brought a bill in the court of Chancery, and issues were directed
to try, whether *Gilbert Knowler* was heir, or one of the coheirs
of *Sir Thomas Coleby*, and a verdict was found in the affirmative
that he was one of the coheirs; and when the cause came
upon the equity reserved, possession of one third of the estate
was decreed to Mr. *Gilbert Knowler*. In a short time after
decree, ejectments were brought by one person, claiming to be
the sole heir of *Sir Thomas Coleby*, and a bill was preferred
by other persons against *Gilbert Knowler*, setting up different titles
to the estate; but the bill was dismissed, and a perpetual injunction
granted: Before a writ of partition could be taken out,
Gilbert Knowler died; but by a codicil, dated *July* the 1st
1737, " he devises all his undivided third in the messuages,
" lands, &c. situated in *Middlesex* and *Essex*, or elsewhere
" (which he, as one of the coheirs of *Sir Thomas Coleby*, had
" recovered), to his brother *William Knowler* the defendant
" in trust, that he shall, with all convenient speed, after
" said messuages, lands, &c. shall be divided and allotted
" to three equal parts, convey and assure in fee-simple
" the Reverend Mr. *Francis Powell*, rector of *All Saints* in the
" town of *Colchester*, and unto his heirs and assigns, such
" and so much of my said premises and lands, as shall be
" valued at the sum of money he the said *Francis Powell* is,
" or may be intitled unto, by virtue of a contract or agree
" bearing date, &c. now in the custody or power of my
" brother doctor *William Knowler*: *Item*, my mind and will
" that my agreement with the said *Francis Powell* shall be
" performed and satisfied out of the messuages, lands,
" lately belonging to the said *Sir Thomas Coleby*, and not out of
" any other part of my estate real or personal."

After the said agreement with *Francis Powell* is fully
performed, he gives to his son *Gilbert Knowler* and his heirs
the rest and residue of the said messuages, lands, &c. and the
defendant doctor *Knowler* and *Gilbert Boucher*, his next
executors to this his codicil.

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or *Knowler*, who was privy to the whole transaction with his late brother and Mr. *Powell*, with regard to the bill for recovering of the estates of Sir *Thomas Coleby*, and is likewise to the articles of agreement that were executed in pursuance of this proposal, and who has also had in his custody ever since, refused to comply with Mr. *Powell's* demands; upon his application to him, soon after the death of the late Mr. *Gilbert Knowler*. The bill, therefore, brought by Mr. *Powell* against doctor *Knowler*, executor of the will of *Gilbert Knowler*, for a specific performance of the articles cited for the plaintiff, *Bickley versus Newland*, 2 P. 182. *Wyat versus Slater*, before Lord Chancellor Talbot. cited for the defendant, *Pool versus Sacheverell*, 1 P. Wms. *Walker versus Gascoigne*, heard in Dom. Proc. 1726. *Wyat versus Booth*, May 2, 1741 (1). *Proof versus Hines*, 1735. *Caf. in Chan. in Lord Talbot's time*, 111. *Dr of the Rolls*: I shall give such an opinion as is agreeable to the notion which I have of the case at present, but so as not to lay myself down, if I should see any reason for varying my

opinion, as it appears to me at first sight, the plaintiff is very proper in bringing a bill for a specific performance of this agreement, and nothing more usual in this court than bills of such a

kind, whether he is intitled to the relief that he prays, is another consideration, and that will depend upon two questions. First, Whether the court will relieve the plaintiff singly on the bill, exclusive of the codicil. Secondly, If the agreement should not be good in equity, whether the plaintiff is entitled to relief upon the foot of the

bill in regard to the first question.

As to the setting out of the agreement it is framed in the nature of a wager, yet, taking the whole articles together, it seems to me to be an agreement only for a part of the estate to be recovered, upon the events taking place of Mr. *Gilbert Knowler's* recovering and being in possession of the whole or part of *Thomas Coleby's* estate, amounting to 8000*l.* in value, or less.

I am far from thinking the person who drew these articles intended them in this manner out of ignorance; but, on the contrary, contrived it artfully to keep them out of the statutes of fraud: for though by way of wager in the outset, yet, in the other part, it is plain, part of the lands were intended to go in satisfaction of the agreement, and the 4000*l.* mentioned in the beginning of the articles, is only intended as a security for the performance of the agreement.

I will, without entering any further into this part of the case, give my very readily own, if it stood only upon the agreement, that the plaintiff could not be intitled to have a specific per-

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(1) *Ante* 25. 27. S. C.

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KNOWLER.

formance in this court, but must have been left to his remedy at law.

I should have had a much better opinion of the plaintiff, if he had not tied himself down by bond in the penalty of 1000*l.* to gather evidence in support of Mr. *Knowler's* title.

Secondly, Whether if the agreement is not good in equity, the plaintiff is not entitled to relief upon the foot of the codicil.

And, as I am at present advised, I do think he is intitled to relief under this head.

The counsel for the defendant, aware of the strength of this will, as to the real intention of the testator to establish the agreement, have endeavoured to put a forced construction upon the words, that the testator did not intend absolutely to confirm and make good the agreement, but has directed only in what manner he would have it done, provided the law should think it such an agreement as ought to be carried into execution.

But to me it seems extremely clear, from the words of the codicil, that it was the testator's intention the agreement should be established, and that he has expressed himself very fully for that purpose, and that he confirms the agreement in the first place, and then directs the manner how it should be carried into execution.

The case of *Wyat* versus *Slater* comes the nearest to the present case.

Upon the whole, the articles of agreement are of no further use, than to serve only as an explanation of the testator's intention, and by way of direction for carrying that intention into execution.

The last consideration is, what decree I shall make.

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I do not think the plaintiff is intitled to payment upon the value of the estate recovered, with the addition of arrears of rents and profits; for, to be sure, an agreement of this kind ought to be taken as strictly and strongly as possible against the plaintiff, and therefore I shall only decree him a moiety of the estate recovered, exclusive of the arrears of rent.

The next question is, when I shall decree the plaintiff to be intitled to this moiety; and I am clear of opinion, that the time ought to be computed from the date of the perpetual injunction, and not so far back as the decree for possession; for Mr. *Gilbert Knowler*, till the injunction, could not be said to be in quiet possession, which were the express terms of the agreement; therefore let the conveyance be prepared accordingly,

No costs were given as to this suit of either side (1).

(1) *Reg. Lib. B.* 1741. fol. 108. a decreed from the perpetual injunction, moiety of the rents and profits were given,

Man versus Ward, December 8, 1741.

Case 180.

MR S. *Haughton* had conveyed away all her right and title in an estate to the defendant, by a deed executed for that purpose, but there were not the common covenants on the part of a vendor, but only that she had done no act to incumber; the plaintiff, notwithstanding this conveyance, offered to read Mrs. *Haughton's* deposition, to impeach her right to this estate, and to shew that it was a pretended title only, and done with no other view than to assist the defendant in carrying on a fraud.

It was objected by the defendant's counsel, that the evidence of a person, who has joined in granting and conveying her estate, cannot be admitted to invalidate her right to the estate, which she has so granted and conveyed, especially as there is a pecuniary consideration expressed in the deed, and the receipt of the money indorsed upon it.

LORD CHANCELLOR,

To be sure, by the strict rules of law, such evidence would not be admitted; for where a person has granted and conveyed, the right real or pretended, the very words *grant and convey* imply a warranty (1), and a covenant for quiet enjoyment on the part of the grantor, and therefore cannot be examined as a witness, to overturn and invalidate the right and title granted by the deed.

ness to overturn the right granted by the deed.

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It is very well known at law, that they are so strict, that no person who is made a defendant can possibly be examined as a witness, but it is every day's experience in this court, that if a plaintiff makes a person defendant for form's sake, it is a motion in course to examine such defendant in the cause, saving just exceptions.

may be examined in a cause, saving just exceptions.

In the case of a trustee who has the legal interest in the estate, but is merely nominal in every other respect, you cannot examine him at law as to the merits or intention of such deed, but there is no manner of doubt he may be a witness in equity (2).

In crown prosecutions no defendant can be examined in behalf even of the King, but the Attorney General at the bar enters a *noli prosequi* against that particular defendant, before he can be admitted as a witness; this was done in a case by *Trevor*, when Attorney General, who was afterwards Lord Chief Justice of the Common Pleas.

In a case of fraud, the evidence of a person who joined in granting away her estate was admitted, though it invalidated her right to the estate.

At law, where a person has granted and conveyed, the very words *grant and convey* imply a warranty on the part of the grantor, and cannot be examined as a witness to overturn the right granted by the deed.

At law no defendant can be examined as a witness; but in equity, a person, made a defendant for form's sake,

A trustee, though merely nominal, cannot be examined at law, but he clearly may in equity.

The Attorney General must enter a *noli prosequi* against a defendant before he can be admitted as a witness, even in the case of the King.

(1) *Vide Har. Co. Litt.* 384. a. note 1. *Temp.* 126. *Note's case*, 4 Co. 80. b. *Perf.* 124. *Clarke v. Samson*, 1 *Ves.* 100.

(2) See *Croft v. Pyke*, 3 Cox's P. W.

182. *Maybank v. Metcalf*, post. 3 vol. 95. *Fotherby v. Pate*, post. 3 vol. 604. *Downing v. Townsend*, *Amb.* 594.

I would

MAN v.

WARD.

It is in particular instances only, as where fraud is charged by a bill, or in cases of trust, that this court does not confine itself within such strict rules as they do at law, but in general, the rules of evidence here and at law do not differ.

I would not have it understood, as if I laid it down, that rules of evidence at law, and in equity, differ in general; but only in particular cases, where fraud is charged by a bill, or in cases of trusts, this court does not confine itself within such strict rules as they do at law, but, for the sake of justice and equity, will enter into the merits of the case, in order to come at fraud, or to know the true and real intention of a trust or use declared under deeds.

It would therefore very much abridge the power and jurisdiction of this court, which is chiefly conversant in cases of fraud and trusts, if I did not admit such evidence: his Lordship therefore over-ruled the objection.

Case 181. *Green versus Suaffo, the second seal after Michaelmas Term, December 10, 1741.*

A point which materially concerns the merchants in general, will induce the court to continue an injunction.

SEVERAL actions had been brought against *Green* upon the loss of six of the galleons, insured by *Suaffo* on a policy of insurance interest or no interest; *Green* brought a bill in this court for an injunction to stay the proceedings at law, which was granted upon a former motion; and now moves for a commission to *America* generally, for the examination of witnesses, which cannot be produced *viva voce* here: It was founded upon the following case.

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The defendant in this court, in 1735, applied to the plaintiff to insure the sum of 6000*l.* on six of the galleons in their voyage from (1) *Cales* to *Porto-Bello*; the policy was conceived in general terms, to insure from all dangers, and the detention of princes; the galleons sailed from *Cales*, and came to *Carthagena* the latter end of 1736; the war broke out between *England* and *Spain* in 1739, and the forts of *Porto Bello* being destroyed by vice admiral *Vernon*, which were a protection to the place at the time the fair was held, the galleons, after the destruction of the forts, &c. never ventured to *Porto-Bello*, notwithstanding a fair is held there annually, though the time of the year is not always the same; the six galleons lay in the harbour of *Carthagena* till the year 1741, when *Don Blasi*, the *Spanish* admiral, and commander in chief there, ordered them to be sunk, to choke up the harbour, and by that means prevent the *English* men of war, under *Vernon*, from entering it.

It was insisted, by the counsel for *Green*, the plaintiff in equity, that, upon the uncommon circumstances of this case, the injunction to stay trial should be continued till a commission

(1) *Cadiz to Carthagena and Porto-Bello.*

for

examination of the facts in *America* had issued, and is (1).

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counsel on the other side insisted, that there are persons in *England*, who are very well acquainted with all these facts and can explain them very sufficiently to a jury, so that a verdict at law can sustain no prejudice by going immediately.

CHANCELLOR,

is a very unusual case, and, upon all the circumstances, that the injunction should be continued till a commission is returned from *America*, but then it ought to be directed to some particular places in the *West Indies*, and not left at large as the plaintiff would have it.

But, it would be a great hardship upon the defendant at law to trial upon such short warning on facts that do not arise in *England*, but altogether in *America*.

There are two very material facts which will come under consideration of a jury at the time of the trial, both which end upon proof that must naturally arise in the *West-*

Whether the voyage was determined at *Carthagena*, and ends upon a second fact, Whether the destroying the *Sc.* at *Porto-Bello*, made it impracticable to hold a fair trial whether in the opinion and imagination of the merchant could not be held there for that reason, and if so, it must not be admitted that the galleons had no intention of proceeding any further, but had determined their voyage at *Carthagena*, which is a very material consideration at the

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possibly be the case, that this was an insurance on behalf of the king of *Spain* himself, who, on the breaking out of war with *England*, might restrain these galleons from prosecuting their voyage to *Porto-Bello*, and order them to continue in the harbour of *Carthagena*: if this should happen to be the case, it would be a very material point for the defendant at law to prove, for whose benefit the galleons were insured, and he said to have determined this voyage himself.

When it may be compared to the case, where houses are insured in this town, when, for the sake of preventing the flames from spreading, firemen are under a necessity of blowing up neighbouring houses; supposing the houses so blown up were insured, the terms of the policy are not broken, as this was a foreseen accident, and a loss not at all guarded against, the insurer shall not be obliged to make it good.

The present case does only affect the defendant at law, but in questions of equity must materially concern the merchants in general.

He also insisted, that the ships were destroyed by the *Spanish* admiral, that was a circumstance which he did not insure against. *Reg. Lib. A.* 1741. fol. 185. See *Cbitty v. Selwin*, post. 359.

general,

MAN v.
WARD.

neral, whether as publick or private insurers, which, if there was no other argument, is of considerable weight with me; I am not hurrying on the trial, but to continue the injunction till the defendant is fully prepared for his defence.

It was agreed by the parties in court, that the commissions shall issue to two places only, *Jamaica* and *Carthagera* (1).

(1) Afterwards at the instance of the *Lisbon* and *Faro*. *Reg. Lib. A.* 1741. defendant, commissions were directed to 185.

Case 182. *Sir William Stanhope* versus *Anthony Cope* and *John Robt Esqrs*; executors of the last will and testament of *William Spinks* December 14, 1741.

A jointure annuity decreed to be redeemed on clearing the arrears, and paying the whole principal sum advanced, and interest to the time only; the plaintiff having offered to redeem.

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WHEN the plaintiff was about the age of nineteen, his father, the late Earl of *Chesterfield*, in 1721, did settle upon him, on his marriage, estates of the yearly value of 700*l.* and upwards, to the use of the plaintiff for life only, *with common remainders: in a very few years afterwards, he had been warily drawn in to lose several large sums in gaming, and being very great distressed for money, the late Mr. *Spinks*, hearing of it and being used to help gentlemen in such difficulties, applied to him, and offered to lend him 800*l.* provided he would give him security as he should desire, which the plaintiff, being under great necessities, accepted of. Accordingly, on the 13th June 1737, a deed was executed, whereby the plaintiff, in consideration of 800*l.* did grant to *William Spinks*, and his assigns one annuity or yearly rent-charge of 100*l.* issuing out of lands of 700*l. per ann.* value, to hold and enjoy the same unto the said *William Spinks* for the term of ninety-nine years, if the plaintiff should so long live, to be paid quarterly, with a clause of distress, if the annuity should be in arrear twenty days after one day of payment; and a clause for receiving the rents and profits of the estate till *Spinks* was satisfied; and in the deed was an agreement, that if the plaintiff should, at the end of five years next ensuing the date, or at any time before he might redeem the said annuity, and should, at or before the end of three years, give notice of his intention in writing to *Spinks*, executors, &c. at or on any of the days of payment, and should at the end of six calendar months after such notice pay unto *Spinks* his executors, &c. 850*l.* and all arrears of the said annuity, in such case the whole should be void; and in this deed the plaintiff was made to covenant, that in case *Spinks* should be minded to purchase another annuity of 100*l.* from the plaintiff, he should, on or before the thirteenth of September then next, to the plaintiff 800*l.* that he should grant him another annuity of 100*l.* issuing out of the same lands, and upon the same terms with the first in every respect, and with the like clause of redemption; there was a further covenant, that if *Spinks* should be minded to purchase another annuity of 100*l.* and should at or before the thirteenth of December next ensuing, pay unto the plaintiff

STANHOPE V.
CORE.

plaintiff the further sum of 800*l.* that he should grant another annuity of 100*l.* issuing out of the said lands, upon the same terms with the two former, and subject to the like proviso of redemption: In about three months after the execution of this deed, *Spinks* made a proposal to the plaintiff, that he would deliver up this indenture of the 13th of *June* 1727, and would advance a further sum of 1000*l.* so as to make up the whole 1800*l.* and that the plaintiff should grant to him one annuity, issuing out of the said premises, of 300*l.* during the joint lives of him and the said *Spinks*; and by deed, of the 12th of *September* 1727, an annuity was granted accordingly, and a clause for redemption indorsed. In the beginning of *December* following, *Spinks* made a new proposal of advancing a further sum of money, upon the plaintiff's granting him an annuity of 300*l.* during the plaintiff's life only, in lieu of the joint annuity; and on the 13th of *December*, 1727, the plaintiff executed a deed accordingly, and signed a receipt for 2250*l.* the consideration therein mentioned, with a proviso of redemption at or before the end of three years, if the said plaintiff shall give notice in writing of his intention to *Spinks*, his executors, &c. at or on one of the quarter days appointed for payment, and shall, at the end of six calendar months after such notice, pay to *Spinks*, his executor, &c. the sum of 2400*l.* and all arrears of the annuity, the said annuity of 300*l.* to be void: on the 2d of *April*, 1728, the plaintiff executed a deed of trust to the Earl of *Chesterfield* and *Mr. Rudge*, of his whole estate, for the satisfaction of his creditors, reserving only 2000*l. per ann.* for himself and family, the residue to pay debts; afterwards a private act of parliament in *G. 2.* was procured for a sale of some of the manors; and the plaintiff by his steward applied in *July* 1738 to *Spinks* to redeem the annuity, upon payment of all the principal money advanced; but *Spinks* made answer, that he did not know what the plaintiff meant, that he did not want money, and that the plaintiff had no right to redeem; upon which the plaintiff filed a bill against *Spinks* on the 6th of *December* 1739, but the defendant dying before he could put in an answer, a bill of revivor was filed against his executors on the 25th of *February* following; the prayer of it was, that the plaintiff may be admitted to redeem the annuity of 300*l.* upon the payment of what shall appear to be due for principal and interest upon a fair account, and if upon such account it shall appear that *Spinks* was fully paid all his principal and interest, that the several deeds may be delivered up, and if *Spinks* shall appear to be over paid, that the defendants may refund.

It was proved in the cause, that *Spinks* was of no trade, but that his sole business was in buying of annuities for single or joint lives; and that one *Rogers*, a broker, purchased for *Spinks*, only by his directions, annuities to the value of 2000*l.* a year, whilst the witness was a clerk to *Rogers*.

There were no proofs offered of the plaintiff's distress at the time *Spinks* applied to him; but depositions on his part that none

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STANHOPE V. COPEL. of the deeds were perused by any counsel for him, but by R only as the counsel for *Spinks*.

[234.] It appeared likewise in evidence, that *Rogers* was one of advertising brokers for securities of this kind. The cases for the plaintiff were *Bosquet* versus *Dashwood*, Nov. 11, cases in Lord *Talbot's* time 38. reheard before Lord *Hardwicke* this was relied on as the strongest case. *Burton's* case, 70. Cro. Jac. 507. *Roberts* versus *Tremain*. *Barney Beak*, 2 Ch. Ca. 136. *Nott* versus *Hill*, 2 Ch. Ca. 120. *Arglass* versus *Muschamp*, 1 Vern. 75. *Wiseman* versus *B Vern.* 121. *Twissleton* versus *Griffiths*, 1 Wms. 310. C versus *Milner*, heard June 19, 1731, before Lord *Chambers*, 3 Wms. 292. *Barnardistea* versus *Lingood*, before *Hardwicke*, February 9, 1740 (1). *Hall* versus *Potter*, 8th Parliament Cases 76. *Duke of Hamilton & ux'* versus *Lord A 1 P. Wms.* 118.

The counsel for the plaintiff, and particularly Mr. M went upon the general rule of inconvenience to the public endeavoured to introduce the same reasoning here, as in other heads of fraud; and cases under the following head cited; 1st, On marriage-brokerage bonds, for which *Vid* versus *Potter*, and the case of the *Duke of Hamilton* versus *Mohun*, 1 Salk. 158. under the second head, selling of agent interests and estates in expectancy, *Vid. Curwin Milner*; under the third head of cases, they mentioned given to lewd women. *Lord Lisburne* versus *Hains*, 5 1734. *Robins* versus *Cocks*, July 13, 1741, and under head of cases, bonds given to attornies pending suits, *Probus Hines*, in Lord *Talbot's* time (2). *Walmsley* versus *January* 29, 1739 (3), re-heard May 2, 1741 (4), and the 5th head were mentioned, bonds given for quartering offices, before Lord *Hardwicke*, in *Mich.* 1736.

At the time the plaintiff executed the last deed, he gave absolute bond for the 2250*l.* and there was no reference to redemption in the deed.

It was insisted on for the defendant, by Mr. Attorney General, that the plaintiff had paid the annuity of 300*l.* due the year 1738, without the least complaint, and that if acquiescence was a very strong circumstance against him there has not been so much as a single witness to shew that plaintiff was in debt, or in any distress at the time of transactions between him and *Spinks*, and that presumption only, without proof, will not prevail in a court of equity: that it appears too, by the plaintiff's own depositions, applied to *Rogers* to find him out a person who would rely on annuities.

LORD CHANCELLOR,

As I am at present advised, I have no doubt but the plaintiff is intitled to a redemption; the question is, whether he

(1) *Ante* 133. S. C.

(2) *Ca. temp. Talb.* 111.

(3) *Ante* 25. S. C.

(4) *Ante* 27. S. C.

itis, or only from the year 1738, the time the plain- STANHOPE v.
to redeem. COPE.

re recommendation of Lord Chancellor, the affair was
led on the following terms.

ney already paid into court was to be applied, in the
to clear the arrears of the annuity to *Midsummer*
and the surplus towards the payment of the 2250*l.* [235]
it shall want of clearing the whole principal advanced,
in two months, but no interest from 1738 to the pre-
2).

ne Register had drawn up minutes of the agreement, Lord Hardwicke
ncellor declared he had a very great aversion to con- so averse to these
his kind, and that he was very inclinable to decree a contracts, that
1 *ab initio*, if it could have been done consistent with he declared he
equity (3). would have de-
creed a redemp-
tion *ab initio*.

if consistent with the rules of equity.

se arrears had been already (3) See *Lawley v. Hopper*, post 3 vol.
278.

Lib. B. 1741. fol. 86.

Trace versus *Harrington*, December 14, 1741.

Case 183.

) CHANCELLOR,

Small v. Atterwood
14. e. Collyer. 37.

necessary in every case of assignments, where all the
interest is assigned over, to make a person who has the
of a party, but if an obligee has assigned over a bond,
umption of its being satisfied arises from the great
ime, as in the present case, where the bond was given
nes Harrington's father in 1709, and assigned over in
no demand has been made in 22 years, till the bring-
bill by the assignee in 1739, the cause must stand over
e representative of the obligee a party, because it is
e obligee himself may have been paid, and therefore
o have an answer as to that particular, either from
representative.

A person who
has a legal inter-
est need not in
every case be a
party, where the
whole equitable
interest is assign-
ed over (1).

Key v. William
348 Collyer.

(1) *Vide Kirk v. Clark. Prec. Cha. 275.*

us Worthington, the third seal after Michaelmas Term, Case 184.
December 14, 1741.

moved by the *Attorney General* to discharge an order
erring depositions to the Master for scandal and im-
, for he insisted that you cannot have such an order
arty in whose behalf the depositions were taken, where
gatories are rightly framed, but the proper application
e been against the commissioners for suffering a witness
their depositions either scandal or impertinence: He
cited

This court will
order depositions
to be referred,
for scandal and
impertinence, to
a Master (1).

(1) *Pyncent v. Pyncent*, post. 3 vol. 557.

COCKS V.
WORTHING-
TON.

cited two cases determined by Sir Joseph Jekyll, *Irisb versus Roke* August 1, 1728. *Skerne versus Vogel*, March 18, 1732. The bill here was brought for a specifick performance of articles on : purchase of a small estate.

LORD CHANCELLOR,

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I do remember the cases cited by Mr. Attorney General ; but I own I had some doubt at the time : it seems to me very strange, that depositions should not be referred for scandal ; as to the impertinence is another question ; but supposing interrogatories should lead to scandal, it is not very fitting that they should be referred in order to expunge the scandal ; but if costs should be insisted on, it would be another consideration, because, as there is nothing of this kind arising out of the interrogatories, the party on whose behalf they are taken, is in no fault ; then the next question will be, Whether the examiners or commissioners who suffer scandal or impertinence to be inserted, ought to pay the costs ; let it stand over to the next seal, to look into the cases cited, and likewise to search for orders made on motions of this sort (1)

(1) *Reg. Lib. A. 1741. fol. 239.*

Case 185: *Cocks versus Worthington, the last seal after Michaelmas Term, December 18, 1741.*

LORD CHANCELLOR,

*Grunde
Worthington
21. 12. 1741*

The cases cited by Mr. Attorney General at a former seal do not come up to the present, but seem only to be hasty declarations of the court, without taking any time to consider : one of them was for impertinence both in the interrogatories and depositions, and therefore could admit of no doubt : but the case of *Horsley versus Horsley*, before Lord Macclesfield, in May 1724, is exactly in point, for it was to refer depositions for impertinence only, and the order was made on hearing counsel of both sides but there were no costs either given against the plaintiff in the case, or his commissioners, because the defendant's commissioners were equally in fault : on the 18th of March 1740, on motion before me, I made an order for referring interrogatories and depositions both for scandal and impertinence ; the Master certified that neither of them were scandalous and impertinent and the court, upon exceptions, held only the 5th interrogatory was so, but at the same time determined that some of the depositions were both scandalous and impertinent, and ordered the scandal and impertinence to be expunged, but gave no costs ; his Lordship therefore did the same in the present case, and declared it was out of decency, and for the honour of this court, who would not suffer any thing scandalous or impertinent to stand in the proceedings here, but that they should be purged of both and likewise, for the sake of the party, that nothing reflecting upon his character might appear.

us, December 15, 1741, the third Seal after Michaelmas Case 186.
Term.

E Attorney General moved to supersede a writ of replevin sued out of this court. That *v. Collins*
: sheriff's court at *Bristol* there was a condemnation of *1 M. d. Craig 25*
upon a foreign attachment; the person who was the *In an Examinatio*
of the ship sued out a writ of replevin against the plain- *of the County of the*
w; it was moved now on his behalf, that it might be *1. Mass. v. Gordon*
ed. *377.*

CHANCELLOR,
writ of replevin is of course, and is not of grace but of The court will
and unless there is a fraudulent use made of it, 'twould not, on motion,
dangerous consequence for me to supersede it upon an supersede a writ
inquiry motion only: you should have pleaded that you of replevin, un-
party in the ship, and then the plaintiff in the replevin less there is a
ve taken out a writ *de proprietate probanda*, (*Vide Reg.* fraudulent use
3. a. and 85. b.) and the whole affair would have been made of it.
heard in the courts at *Westminster*, for after the writ After a writ has
e issued here it is *de officio*, and this court has nothing once issued here,
to do in it. it is *de officio*, and
this court has
nothing further
to do in it.

: was something of the same nature before Lord Mac-
in the case of *Ward v. The Duke of Buckingham*, upon
of a large quantity of allum, when his Lordship cited all
learning upon original writs, and pointed out this me-
proceeding to Mr. *Ward* by pleading property.

Tates versus Hambly, December 17, 1741.

Case 187.

objection was made for want of parties.

The bill in this case was brought to redeem a mortgage
standing.

S. C. post. 360.
Where a mort-
gagee in fee has
made an absolute
conveyance with
brought before

entailments and remainders over, the first tenant in tail at least must be brought before

Osborne v. Fuller
1 Ruff. & M. 741

objection was, that as there has been an absolute convey-
ance of this estate by the mortgagee without any clause of
reservation, with several limitations over, the persons in remain-
der this conveyance ought to have been parties.

CHANCELLOR,

re a mortgagee, who has a plain redeemable interest,
several conveyances upon trust, in order to intangle the
land and to render it difficult for a mortgagor or his represen-
tative to redeem, there it is not necessary that the plaintiff should
call all the persons who have an interest in such trust, to
make them parties.

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where the redemption depends upon equitable circum-
stances, and the plaintiff is not in the common case of redemp-
tion, and where the mortgagee in fee has made an absolute con-
veyance

YATES v.
HAMELY.

veyance with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court.

Cafe 188.

Aylet versus Dodd, January 26, 1741.

The owner of
Land charged
with an annuity,
for the payment
of a school-master,
will not be ex-
cused from the
payment thereof
on account of
there being none
for six years.

THOMAS Aylet by his will charged his lands in *Essex* with the sum of ten pounds *per ann.* for the maintenance of a school-master, but the repairs of the school to be at the expence of the master himself; the annuity is directed to be paid half-yearly at *Lady-day* and *Michaelmas*, and if either of the payments should be in arrear 42 days after it became due, then 5*s.* *per week* was allotted by way of *nomine pæna*.

A commission of charitable uses issued out of this court, and by the inquisition it was found that there were six years vacancy, in which there was no school-master from 1728 to 1734.

The commissioners summoned the owner of the land charged with the annuity to appear before them, but he making default, they awarded that he should pay all the arrears of the six years, and the *nomine pæna*, amounting to 45*l.* and costs besides (1).

The exceptant took two exceptions.

1st. That he ought not to pay the arrears of the annuity for the six years, because the testator gives it only while there is an actual school-master, and the vacancy is not owing to any fault of the land-owner.

2^d exception, 'That supposing he should be decreed to pay the arrears, yet the *nomine pæna* will be relieved against in a court of equity, upon paying such sums as have been found in arrear.

Though there
are not persons
in a parish suf-
ficient to answer
the description
of a charity, yet
the land charged
with the pay-
ment is not dis-
charged during
that time.

Lord Chancellor over-ruled the first exception, and compared it to the case of a charity for a maintenance of a select number of alms people, where notwithstanding there are not persons in a parish sufficient to answer the description of the charity, yet the land charged with the payment of the charity is not discharged during that time, but shall accumulate, and be applied towards the advancement and increase of the charity.

Five shillings *per*
week allowed by
way of *nomine*
pæna, if either
of the half-yearly
payments of an
annuity was in
arrear 42 days
after it became
due, the court

With regard to the second exception, Lord Chancellor said, that the *nomine pæna* should stand according to the intention in all these cases, as a security for legal interest, when the principal sum is not regularly paid at the particular days appointed for it: but would not decree the exceptant to pay a gross sum, to be computed at five shillings *per week*, after default of payment made.

will direct it only to stand as a security for legal interest, when the principal sum is not regularly paid.

(1) The commissioners awarded 60*l.* the arrears of the annuity for six years to be paid towards the repairs, &c. of the school; 45*l.* four years and an half ar-

rears since 1734, to be paid to the defendant *Dod*, and also 43*l.* for the *nomine pæna*, besides costs. *Reg. Lib. A.* 1741. fol. 294.

Where

Where there is a clause of *nomine pœne* in a lease to a tenant, to prevent his breaking up, and ploughing old pasture ground, it is otherwise; for the intention of it there, is to give the landlord some compensation for the damage he has sustained, from the nature of his land being altered, and therefore in that case the whole *nomine pœne* shall be paid, and not at the rate of *five per cent.* only for the rent reserved (1).

**AYLET V.
DODD.**

The whole *res-
mune pœna* in a
lease to a tenant
to prevent his
ploughing up old
pasture ground
shall be paid, and
not at the rate of
the rent reserved.

As to costs, his Lordship said, it has been determined upon the construction of the statute of charitable uses, 43 *Eliz. c. 4.* that commissioners have no power to give costs, but this court can do it; and therefore as the exceptant has been very vexatious, *Lord Chancellor* decreed costs against him to be taxed by a Master (2).

Commissioners of charitable uses have no power under the 43 Eliz. c. 4. to give costs, but this court can do it.

(1) See *Benson v. Gibson*, *post.* 3 vol. 95.

(2) *Reg. Lib. A. 1741. fol. 294. The Corporation of Burford v. Lenthall, page 551. Barn. Cha. 37.*

Lytle and Church versus *The Attorney General*, January 29, Case 189.
1741. *Pieschel*

Pieschel v. Pers
2. J. v. Stänkel?

TWO hundred pounds were given under the will of Mr. C. by will gives Church to the ward of Bread Street, according to Mr. — to Bread Street ward 200l. according to Mr. — will.

rd **Hardwick** would not allow of parol evidence to explain the testator's intention when there is a **blank**
ly (x)-

The bill brought by the alderman and principal inhabitants of the ward, to have the directions of the court for the application of this charity, and the Attorney General was made a dependant.

LORD CHANCELLOR,

These are instances where this court had admitted parol evidence to ascertain the person intended by the testator, where he has been mentioned only by a nickname, or where there have been two persons who have had the same Christian and surname; but I do not remember any case where the Court has gone so far, as to allow parol evidence of the intention of a testator, where there is only a blank, and therefore would not permit it to be read.

Dec. 4. Good &
3. Vicks. Coll. & W.
Cherry. Mott
Myhre & Co.
Mayo

When a person is mentioned by a nickname, or where there have been two who have had the same Christian name and surname, parol evidence has been admitted to ascertain whom the testator meant (2).

The money in this case was decreed to be disposed of in such charities as the

Though the alderman and inhabitants of a ward are not in point of law a corporation, yet as they have made the Attorney General a party in order to support and sustain the charity,

(1) *Hunt v. Hort*, 3 Bro. Cha. Rep. 311.
Castles v. Turner, *post.* 3 vol. 257.
 Vol. II.

(2) See *Ulrich v. Litchfield*, post. 373. *Am. N.S.*

BAYLIS V.
ATTORNEY
GENERAL.

can make a decree that the money may, from time to time, disposed of in such charities as the alderman, for the time being, and the principal inhabitants, shall think the most beneficial to the ward (1).

(1) His Lordship directed, that the plaintiff should lay a scheme before the Master for the application of the 200*l.* and interest, to some charitable use, for the benefit of the said ward. *Reg. Lib. A.*

1741. fol. 252. *Cook v. Ducken* post. 562. 569. *Attorney General v. 1 man*, 2 *Eq. Ab.* 193. pl. 14. *W. bi. White*, 1 *Bro. Cha. Rep.* 12. *Mogg v. Thackwell*, 3 *Bro. Cha. Rep.* 517.

Case 190.

Brereton versus Gamul, January 29, 1741.

A Bill was brought against the defendant for a discovery of title-deeds, and likewise of the title to the estate in question, and for relief, and to be let into the possession of the premises.

Tenant for years at will, or at sufferance, cannot by fine divest an estate, and turn it to a right.

The title set up by the plaintiff is a right to a reversion in expectancy upon the determination of a lease for 99 years. At the term expired, which happened in the year 1715, the defendant continued in possession, and paid a reserved rent of 10*s.* taking the advantage of the plaintiff's ignorance of his title he had no counterpart of the lease, the defendant levied a fine of these very lands, of which he was only tenant at will: the plaintiff having come to some knowledge of his title about a year before the fine was levied, he applied to the defendant to be let into possession, but he refused to do it, upon which the plaintiff in 1722, brought an ejectment, to which the defendant appeared, and nothing further was done upon it.

The defendant, to the present bill, pleads the fine so levied, and five years and non-claim, as a bar both to the discovery of the title, and the title-deeds, and likewise to the relief prayed under the bill.

LORD CHANCELLOR,

If a person has lost his right by a legal bar, he cannot have no remedy.

If the plaintiff has lost his right by a legal bar, he can have no remedy; but his case, as stated by the bill, and not at all defeated by the answer, is of such a nature as intitles him to all the relief that this court can shew him.

It would be of dangerous consequence to admit of such pretence as appears in this case; for nothing is more common than long terms of years with a small rent reserved, and it very frequently happens those who claim under the original lessor, at the length of the term, become quite ignorant of their title.

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A plea of a bare title only, without setting forth any consideration, will not protect a defendant from giving an answer to the title set up by the plaintiff.

A valuable consideration set forth by the defendant protects him from giving an answer to a title set up by the plaintiff, a plea of a bare title only, without setting forth any consideration will not do it.

BREKETON v.
GAMUL.

A plaintiff, in this case, is intitled, not only to have discovery in matters which he cannot prove, but of such matters as may be of ease and relief to him in recovering his title (1).

The facts, as they are stated by the bill, of the defendant's being only a tenant for years, and paying rent after the expiration of the term, I must take for granted, as they are not denied by the answer.

Tenant for years, at will, or at sufferance, cannot, by fine, divest an estate, and turn it to a right (2.)

But what the defendant insists on, is a disseisin, and the acts to create this a disseisin, are matters *in pais*, as length of possession, non-payment of rent, &c. but the principal thing relied on is the ejectment.

An ejectment every body knows is a fictitious thing only to come at the right in question (3); therefore the confession of lease, entry, and ouster, will only operate to the purpose for which the ejectment is intended, and is equally fictitious with the ejectment itself; for it would be of extreme ill consequence that such a proceeding should give a seisin to the defendant in ejectment, so as to enable him to levy a fine.

The confession of lease, entry, and ouster, will operate only to the purpose for which the ejectment is intended, and is equally fictitious with the ejectment itself.

Next, as to the fine itself, it is levied by a general description of lands lying in such a parish, in the county palatine of *Chester*: now there are frequent instances of tenants in fee, who, in levying a fine, often put in more parcels of land than do actually belong to the conusor, but then a court of equity will restrain it to such lands as do really belong to the conusor.

Though in a fine there are often more parcels of land than belong to the conusor, yet a court of equity will restrain it to such lands as really belong to him.

Here the defendant had lands lying in the same parish, to which he had an indisputable right, and though the plaintiff had notice of the fine by the proclamations according to the usual course in the grand sessions of *Wales*, yet the deed to lead the uses of that fine was in the conusor's pocket, so that the plaintiff could not know of what lands it was levied, and therefore might reasonably conclude it was levied of such lands in this parish as the defendant had a right to levy it upon.

The plea ordered to stand for an answer, with liberty to except, save as to matters of account.

(1) *Vide 2 Ves. 399. 492. Debigge send v. Ash, post. 3 vol. 339. Shields v. Howe, 3 Bro. Cha. Rep. 155. Atkins, post. 3 vol. 562.*

(2) *Vide 1 P. W. 519. Dormer v. Packhurst, post. 3 vol. 135. 141. Fourn-*

(3) *2 Burr. 667, 668.*

Lowther versus Carlton, February 1, 1741.

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Case 191.

LORD CHANCELLOR,

THIS is a bill brought to impeach a purchase made 32 years ago: the defendant was a purchaser with notice, from the Marquis of *Wharton*, who bought without notice.

Self from a person who bought without notice, may shelter himself under the first purchase.

S. C. ante 139. *Finn*
S. C. Ca. Temp.
Talb. 186. *bo.*
A purchaser
with notice him-
self the first purchase. *Spa*

LOWTHER v.
CARLTON.

*argued
Thurs. 157
Term.*
Where, by a transaction foreign to the business in hand, a counsel or attorney employed to look over a title, has notice, that shall not affect the purchaser.

It is certainly the rule of this court, that a man who is a purchaser with notice himself from a person who bought without notice, may shelter himself under the first purchaser, or otherwise it would very much clog the sale of estates (1).

If a counsel or attorney is employed to look over a title, and by some other transaction, foreign to the business in hand, has notice, this shall not affect the purchaser; for if this was not the rule of the court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more likely than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind (2).

- (1) *Harrison v. Fortb, Prec. Cha. 51. tins v. Jolliffe, Amb. 311. 313. Vide Brandlyn v. Ord, ante 1 vol. 571 Sweet Le Neve v. Le Neve, post. 3 vol. 646.*
v. Southcote, 2 Bro. Cha. Rep. 66. Mer- (2) Worsley v. The Earl of Scarborough, post. 3 vol. 392.

Case 192. *Barret and others, Creditors of John Powell, versus Ann Powell, Widow, and others, February 1, 1741.*

An assignment by the clerk of the peace to creditors under the statute for relief of insolvent debtors need not be sealed.

A Bill was brought by creditors against an heir of an insolvent person, and likewise against his widow, to have the benefit of the assignment of the insolvent's estate from the clerk of the peace at the sessions, under the statute for the relief of insolvent debtors.

It was objected by the counsel for the defendant, that the assignment, in this case, by the clerk of the peace, to the major part of the creditors, is informal, because it is only signed by the clerk of the peace, and not sealed; and that as the act of parliament directs an assignment, and does not dispense with sealing, that it ought to be executed like all other assignments to convey real estates.

Master of the Rolls. I am of opinion that the assignment without sealing is sufficient, as it has been the constant method taken by all clerks of the peace since the act of parliament for relief of insolvent debtors took place.

[243] *Smith, and Helen his Wife, versus French, Widow, February 20*
Case 193. 1741.

If a husband, even after marriage, conveys his wife's fortune to a trustee for her separate use, and the trustee is guilty of a breach of trust, this court will oblige him to make satisfaction to the *cestui que trust*.

THE bill was brought for a satisfaction of a breach of trust, and the plaintiffs by it have made the following case: *Helen*, the daughter of the defendant, lived with her till she married her first husband, Mr. *Sagar*; upon his making his address to her in the way of marriage, Mrs. *French*, the mother of the plaintiff *Helen*, approved of the match, and the day before the wedding agreed to be a trustee of 1000 *l.* the portion of *Helen*, which consisted of tallies or Exchequer orders at 3 *l. per cent.* and for this purpose the mother had the orders delivered

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FRENCH.

Mara v. Mar
2. J. v. L.
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vered to her, and assigned to her by an indorsement upon each of them: previous to the marriage a settlement was prepared, but not executed till after (1), by which the trust of this 1000*l.* was declared to be, in the first place, for the sole and separate use of the wife during the coverture, and for the issue of this marriage, and in case there should be no issue, that then the absolute property should vest in the survivor of husband or wife; in a very few years afterwards, Mr. *Segar*, being distressed in his circumstances, prevailed upon the mother, who was the trustee, to let him have these orders, and sold them, and applied the money to pay his own debts, except 350*l.* which he refunded to the mother upon her pressing him for it; he died insolvent, and therefore, as the mother was a trustee for the daughter, the plaintiff, the plaintiffs insisted she has been guilty of a breach of trust in delivering up the tallies for 1000*l.* to the power of the husband, and for that reason ought to make good the deficiency, which is 650*l.* to the plaintiffs.

The defendant, Mrs. *French*, made this defence: That she disapproved of the match between her daughter *Helen* and Mr. *Segar*, but upon the solicitations of her daughter did agree to it at last, and admitted that she had the tallies indorsed over to her for the 1000*l.* the day before the marriage, but in a very short time after the husband, Mr. *Segar*, became very necessitous, and his creditors very importunate; and that, at the joint request and the repeated importunities both of her son-in-law and daughter, she did deliver over the tallies to Mr. *Segar*, but not with an intention that he should imbezle them to his own use, but upon his suggestion, that the land-tax tallies, of which these were part, were quite full, and that he must sell them out and buy others; that when she found Mr. *Segar* had imposed upon her, and had applied the money to pay off his debts, she threatened to sue him; upon which her daughter fell upon her knees, and begged her mother would desist from her intention, for it was only making bad worse, and that she would release her mother from any demand she might have against her, on account of the trust: the mother did not proceed in suing the husband, but by fair means recovered back 350*l.* afterwards, till the day of his death, the husband and the plaintiff *Helen* lived with Mrs. *French*, and were maintained by her, and from his death till her second marriage, which was no less than seven years, the daughter lived with the defendant, and never insisted upon this demand, but several times offered to give the mother a release.

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The facts of the plaintiff *Helen's* falling upon her knees, to solicit in behalf of her first husband, and of her offering to execute a release to her mother, after *Segar's* death, was proved by *Judith Powell*, another daughter of the defendant, who was about eleven years old, when the first fact happened, and about thirteen when the second happened, of the plaintiff *Helen's* promising to release.

(1) The bill charged, that it was executed before the marriage, which circumstance was denied by the answer.

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The principal case relied on for the plaintiff was cited by Mr. Noel, and is mentioned in *Needlar's case*, *Hob. page 225. 7 Ed. 4. 14.* the wife being *cestuy que trust*, she and her husband sold the land: she received the money, and they both required the feoffee to make estate to the vendee, and yet she, after her husband's death, was relieved against the feoffee, and might also against the vendee if he was privy to the use.

LORD CHANCELLOR,

The question in this case is singly between a *cestuy que trust* and a trustee, and therefore it is not at all material whether the settlement is voluntary, or for a valuable consideration.

And if there were no other circumstances, it cannot be doubted, but if a husband, even after marriage, conveys his wife's fortune to a trustee, for her sole and separate use, and the trustee is guilty of a breach of trust, that this court will decree him to make satisfaction to the *cestuy que trust*; indeed if there were creditors of the husband, who had a prior lien upon the property so conveyed, it might make a material difference.

The principal question here is, Whether, upon all the circumstances of this case, the defendant has been guilty of a breach of trust, and this must depend upon the defence which she has set up by way of rebutter to the plaintiff's demand; if it stood clear of such circumstances there could not be a plainer breach of trust than delivering up these tallies to the power of the husband.

But the present case appears to me to be a very hard, and a very harsh demand in a court of equity, as it is circumstanced, taking the evidence on both sides to be true.

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He then run over the material parts of the defence, in the manner I have before stated it.

In the first place, his Lordship said, here is a very strong equity for the mother, that what she did in the affair was at the importunity and repeated solicitations of the daughter, and who since the death of her first husband has over and over again offered to execute a release, when she might beyond all contradiction have done it; for though the assignment was an unfortunate transaction for the daughter, yet, as it was done at her own request, she could not blame her mother for it.

Though a witness be an infant, his tender years will not invalidate his evidence.

An objection has been made to the most material witness for the mother, who is *Judith Powell*, because she was but eleven years old when she swore to one fact, and thirteen when she swore to the other; but notwithstanding her tender years, this does not at all invalidate her evidence, for such a circumstance, as a brother and sister's being in the utmost distress, and the falling upon her knees to beg and implore a mother not to ruin them, must make full as great an impression upon a young mind as an old one.

There is another observation very material for the defendant that notwithstanding the plaintiff *Helen* lived with her mother at the time the second marriage was proposed, yet there is not syllable of proof offered to shew, that either *Helen* herself, or the plaintiff, mentioned the least tittle of this affair, or ever

MAC

demand of the 650 *l.* which they have now set up by

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it is an extreme harsh one, after all the kindness and the plaintiff *Helen* has received at her mother's hands; in opinion the defence is very sufficient to rebut all the equity.

If an infant who contracted a debt during his minority, confirms it after he comes of

age it will bind him, though *voidable* at his election.

it comes very near the case the defendant's counsel pared it to, of an infant under age, who contracting a big his minority, shews his consent to it, by confirming comes of age, which shall effectually bind him, though dable at his election (1).

; a promise by the wife to release during the cover- certain could not bind the wife, but if after the death ofband she repeats the promise, it is a confirmation of good.

A promise during coverture does not bind a wife, but if repeated after the hus-

band's death, it is a confirmation.

se of *Thayer and Gould*, Feb. the 9th, 1739, (*vide* 1 T. .) first heard before the late *Master of the Rolls*, and s before me, has been compared by Mr. Noel to the out there the circumstances in support of the plaintiff's were much stronger than in the present.

in that case, after being very hardly and cruelly used and, was prevailed upon to join with him in impore trustee, to convey over a trust estate, which was for te use of the wife, to the husband, and as the trustee ry near relation, he could not be supposed to be ig- the cruelties the wife had undergone, especially as proved to be in tears the whole time, that the con- rom the trustee to the husband was reading and exe-

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was another strong circumstance against the trustee, actually retained as much out of the trust, as would sat of his own from the husband: besides too, it was h had been conveyed in trust, and I remember very at stress was laid upon the circumstance of its being : I did not make any decree there, for upon my re- ation the affair was compromised, and a middle way by the parties to put an end to the dispute.

present case the original bill was decreed to be dis- without costs, so far as it seeks relief for the remainder oo*l.* And a cross bill brought by the defendant for and maintenance of the daughter, was likewise dis- without costs.

Wheeler v. Gally, ante 35. *Chesterfield v. Janssen*, ante 1 vol. 354. note.

Cafe 194. *Bagshaw* versus *Spencer*, at the Rolls, February 18,

S. C. 1 Vez.
d post.
1787

JENAMIN Allison devises lands to B. and C. heirs, in trust by rents and profits, sale, or money to pay his debts, and funeral expences, and after in trust moiety to the use of his nephew *Thomas Bagshaw* for life, without impeachment of waste; remainder to trustees and their heirs, during the life of the said *Thomas Bagshaw*, to the contingent remainders, with remainder to the heirs of the body of *Thomas Bagshaw*, with other remainder over. It was adjourned, after some debate, till a decision should be made in the case of *Colson* and *Colson*: but in the mean time here were two material differences; 1. The clause *sans* 2. This was a trust, and the court must necessarily and decree a conveyance. Vide the case of *Legate* at 1 P. W. 87.

(1) Vide post. 580. where Lord Hardwicke made this distinction.

Cafe 195. *Colson* versus *Colson*, Mich. 14 Geo. 2. 1741, in 1

S. C. 4 Sim.
1745.

Colson v. Hicks
L. & Ell. 38.

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Colson v. Colson
S. C. 1.

Colson v. Fitzmaurice
S. C. 1.

Colson v. Warren
S. C. 1.

Colson v. Gilbert
S. C. 1.

Colson v. Hope
S. C. 102.

THIS was a case sent out of the Court of Chancery for the opinion of the court of King's Bench. The words were: "I give and devise my lands at C. to Robert my grandson, for his life, remainder to A. and B. and C. to support contingent remainders during the life of C. Colson, remainder to the heirs of the body of Robert Colson lawfully begotten;" and the question was, Whether Robert Colson had an estate for life or in tail (1)? Mr. Holt said that he had an estate-tail, for that it was a rule in law, that the ancestor took an estate for life, with words of limitation to his heirs, or the heirs of his body, they shall not take in fee simple, but by descent, and that the testator's intent did not controul the operation of a rule of law. *King versus Ventriss* 214 & 225. 2 Lev. 58. *Blackburn versus P. W.* 54. 56. 2 Roll. Abr. 258. *Trevor versus Trevor* Caf. Eq. 387. 1 Lutw. 825. *Carth.* 171. *Lord versus Bosville*, Caf. in Eq. in Lord Talbot's time, 3 678. There being trustees to support contingencies difference, as appears from *Papillon versus Poyce*, 2 P. W. which, to this question, is fully in point, there the trustees.

Mr. Bontle on the other side argued, that the testator was to give an estate for life to the grandson, by purchase to take advantage of the forfeiture, which could not be if he was tenant for life. 2dly. The intention of the testator was the chief rule in the construction of wills, he cited *Papillon and Bois*, Eq. Caf. Abr. 185. and that the word heirs is a word of purchase. *Carth.* 272. *Pybus versus Pybus* 3 Kent. 372.

(1) Reg. Lib. A. 1738, fol. 597.

Colson versus Colson, November 12, 1743. A Re-hearing.

ROBERT Bromley, seized in fee of the reversion and inheritance of several estates at *Thorpe Bulner*, in the bishoprick of *Durham*, expectant on the death of *Elizabeth Forster*, by his will, dated the 12th of *July*, 1712, devised the same, expectant as aforesaid to *Robert Colson* for life, remainder to trustees during his life to preserve contingent remainders, remainder to the heirs of the body of the said *Robert Colson*, remainder in like manner to the defendant, *William Colson*, and the heirs of his body.

After the testator's death, *Robert Colson* with *Elizabeth Forster* suffered a common recovery, and declared the uses to the said *Elizabeth Forster* for life, remainder to *Robert Colson*, and his heirs.

Mr. Attorney General, counsel for the plaintiff, *Elizabeth Colson*, sister of *Robert Colson*.

The principal and only question he said arose upon the devise in *Robert Bromley's* will.

It is insisted on by the defendant, *William Colson*, that *Robert* was only tenant for life, and consequently was not intitled to suffer the recovery.

This cause was heard before Mr. *Verney*, the late Master of the Rolls, in *July*, 1739, who referred it to the Judges of the court of King's Bench upon this point; in pursuance thereof a case was made, and there were two arguments before the Judges of the court of King's Bench; but they declined giving any opinion, and therefore the parties have been advised to bring it in this shape before your Lordship.

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All the directions prayed by the plaintiff's bill are consequent of the opinion the Court will give in this point.

Mr. Attorney General for the plaintiff: Connecting these two estates together, I insist makes an inheritance in *Robert Colson*, and the rule from whence I argue is laid down in 1 *Inst.* 309. a. and b. and *Shelley's* case, 1 *Co.* 93. b.

It is not at all material, whether there is any estate intervening, for it is the same if limited to *A.* for life, and to the heirs of the body of *A.* or to *A.* for life, to *B.* for life, and to the heirs of the body of *A.*

Where the ancestor makes such a limitation as this, it is giving the devisee every thing, and the sense of the law in this respect is so very strong that nothing can be plainer. *Vide* 1 *Inst.* 28. b.

An ancestor cannot make his heirs purchasers; and another reason is, the law will not suffer an estate of inheritance to be in abeyance; the rule extends to the case of wills as well as to conveyances in the life of the party,

It is not sufficient to say that we are to be governed by the intention of the parties, for a man cannot break through the rule of law, but this intention must be consistent with it. *Vide* *Saul v. Gerard*, *Gro. Eliz.* 525.

The

COLSON v.
COLSON.

The next consideration is, what there is in the particular framing of this will to take it out of the general rule.

It has been insisted that *Robert Colson* took an estate for life only, and that his heirs are purchasers.

But in this will the intention is very plain that the heirs of *Robert Colson* should take *per formam doni*, for here is all the appearance of an estate-tail, heirs of the body of his grandson lawfully begotten or to be begotten, words most peculiarly significant to create an estate-tail; and great stress was laid upon them by Lord Ch. Just. *Hale*, in *King v. Melling*, 1 Vent. 212-225.

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It has been urged by the defendant's counsel, here are strong words to shew the testator intended only an estate for life as a devise to his grandson for and during his natural life, &c.

But then the contingent remainder, preserved by the limitation to the trustees, is nothing more than the limitation to the heirs of the body, and not to a remote remainder.

Suppose the testator had said to trustees to preserve contingent remainders to the right heirs of *Robert Colson*: the gentlemen on the other side would hardly say that right heirs *eo nomine* can take as purchasers, the law would not admit of it, and yet the intention is equally clear here, as it would have been there (1).

If the limitation had been to the heirs of the body of a stranger, it might have been otherwise, for they would have been purchasers, because there was no ancestor to take first, but there is no case where heirs of the body take as purchasers if the ancestor has the estate for life.

I will put the strongest case; suppose a devise to *A.* remainder to his heirs, and that the testator should by express words say, intend the heirs should take as purchasers, yet it would not prevail against the rule of law that heirs cannot take as purchasers.

The second point I would insist upon is, that the rule of law must prevail against the plain intention of the testator: *Goodright* versus *Pullen*, 12 Geo. 1 (2). Devise to *Nicholas Lisle* for life remainder to the heirs of his body and his heirs for ever. Here the latter words were necessarily rejected, because they would destroy the estate; and the court held this was an estate-tail, for they were words of limitation and not of purchase. *Vide Lega* versus *Seawell*, 1 P. W. 87. and *Morris* versus *Wood*, at the *Cocpit*, a plantation cause, the 24th of *March*, 1730, held to be an estate-tail by Lord Chief Justice *Raymond* and *Eyres*. In *Lord Glenorchy* versus *Bosville*, *Cas. in Eq. in Lord Talbot's time*, 3. declared there by Lord *Talbot*, that if it had been a devise of a legal estate, it would have been an estate-tail. *Vide Roberts* versus *Dixwell*, December 8, 1738, before Lord *Hardwicke*, (1 T. At 607.) *Thrustout* versus *Peat*, *Mich. T.* 3 Geo. 1.

In all these cases it was plainly the intention of the testator that there should be only an estate for life, and yet held to be an estate-tail in conformity to the rules of law.

(1) *Vide Godolphin v. Abingden*, ante 57.

(2) 2 *Id.* *Raym.* 1437. S.

It is observable on the cases upon the words *issue of the body and heirs of the body*, that they have never been construed words of purchase, but where the testator intended to point out particular persons.

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COLSON.

LORD CHANCELLOR,

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I would willingly deliver the parties from any further trouble, if I could do it consistently with the rules of the court; but this is a mere question in law, and is already put in a proper course; and unless there was something executory in it, I ought not to meddle with it in equity, except there were some case already in point determined: but as there is not one determined where there is an interposition of trustees to preserve contingent remainders, I will therefore affirm the late Master of the Rolls's order of reference to the Judges of the court of King's Bench, then it will go on regularly.

A certificate of the Judges of the court of King's Bench, upon the 8th of May, 1744, in the case of *Colson* versus *Colson*.

WE have heard counsel in the question referred by your Lordship to us, and as it appears by the state of the case, there is, after the determination of the estate for life to *Robert Colson*, a devise to *Isabella* his daughter, and to *Ralph Robinson* and their heirs for and during the life of *Robert Colson*.

We are of opinion, that by reason of the remainder interposing between the devise to *Robert* for life, and the subsequent limitation to the heirs of his body, the said *Robert* took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate-tail in remainder vested in the said *Robert* (1).

Sir *William Lee*, Knight, Chief Justice.

Sir *William Chapple*, Knight, }
Martin Wright, Esq. } Justices.
Thomas Denison, Esq. }

(2) *Hodgson v. Ambrose*, Dougl. 323. S. P. *Jones v. Morgan*, 1 Bro. Cha. 206.

Willis versus *Jernegan*, February 26, 1741.

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THERE had been several transactions between the plaintiff and defendant, in relation to the defendant's lottery or sale, as it was called, of plate, jewels, &c. and particularly an agreement in relation to the receipts or tickets in the sale, a great number of which, to the amount of no less than eleven thousand, had been delivered to the plaintiff, who was to pay a stated price for them, and if by ingrossing such a quantity he could

Case 196. *Scott*
If a person will enter into a hard bargain with his eyes open, equity will not relieve him upon this footing only. *21*

Thomson
2. 210 375.

WILLIS V.
JENNINGS.

*Steman v
Nellerth
Mac: H. 309*

*Donica
v. 144
13 Bro. 4 26*

sell them above par, the profit, let it be ever so great, was to go into the plaintiff's pocket: "the plaintiff might have sold them to very great advantage, but, by out-standing his market, and insinuating upon an exorbitant premium, he was a considerable loser; and now brings a bill to be relieved against the defendant, suggesting the agreement to be hard and unconscionable, and likewise for an open account between him and the defendant.

The defendant sets forth the whole agreement, and insists that there was no fraud or circumvention, but that it was a transaction carried on with the utmost fairness, and an agreement entered into at the plaintiff's own request; and that if it was not so beneficial a one as it might have been, it was entirely owing to the mismanagement of the plaintiff; and, as to the open account prayed, the defendant pleads a stated account in bar, which had been settled between him and the plaintiff some time after the sale or lottery was finished, and entered in a book that related merely to the transaction between him and the plaintiff, and to no other purpose whatever; and that the adjusting of this account had taken up a week's time at least; and the plaintiff, at the time, and often since, had declared himself extremely well satisfied with it.

There were several witnesses on the part of the defendant to support the agreement, and the several facts insisted on by the answer, but there was not a tittle of evidence on the behalf of the plaintiff to support the allegations in his bill.

LORD CHANCELLOR,

It is not sufficient to set aside an agreement in this court, to suggest weakness and indiscretion in one of the parties who has engaged in it; for, supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can shew fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement (1), which is not pretended by the plaintiff in the present case; for, from the evidence, he appears to have been so fond of this project of a sale of plate, jewels, &c. that no person ever had such an easy stomach, and quick digestion, for he wanted to have monopolized the whole number of tickets.

The plaintiff's counsel have made two objections to the defendant's plea of a stated account.

1. That it was not signed by the parties.

2. That the vouchers were not delivered up at the time.

Where persons have mutual dealings, signing the account is not necessary to make it a stated one, but it is keeping it any length of time, without making an objection, which binds the person to whom it is sent.

As to the first, there is no absolute necessity that it should be signed by the parties who have mutual dealings, to make it a stated account, for even where there are transactions, suppose

(1) *Wile Chesterfield v. Janssen*, ante 9, 10. *Gartside v. Isherwood*, *ibid.* 560
1 vol. 351. *Nichols v. Gould*, 2 Ves. 422. *Heathcote v. Paignton*, 2 Bro. Cha. Rep
512. *Gwynne v. Heaton*, 1 Bro. Cha. Rep. 167. *Lewis v. Peaz*, *Pej.* jun. 19.

between

between a merchant in *England* and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterwards (1).

WILLIS vs
JERNEGAN.

The second objection is because the vouchers were not delivered up.

Now there is no doubt, if vouchers are delivered up at the time, it is an affirmation at least, that the account between the parties was a stated one, but to make it so, it is not absolutely necessary they should be delivered up at the time the account is settled; for instance, in the case of bankers and their customers, it is seldom done, but the drafts which are made upon them are constantly kept on files, and at different times, when they settle accounts with you, they only enter in a book which they give you for that purpose the several receipts and payments during your transactions with their shops, and it would be imprudent in them to do otherwise, because the vouchers are very often of use to them in clearing up any disputes between their shop and a third person.

The delivering up vouchers is an affirmation that the account between the parties was a stated one, but not absolutely necessary they should be delivered up at the time the account is settled. Bankers keep the drafts which are made upon them on files, because they are vouchers,

ers, and of use in clearing up disputes between their shop and a third person,

Lord Chancellor decreed the plaintiff's bill to be dismissed with costs (2).

(1) The account was signed by a witness. the stated account, it was dismissed with costs. *Reg. Lib. B. 1741. fol. 192.*

(2) So far as the bill sought to open

Brace versus Taylor, February 10, 1741.

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Case 197.

WILLIAM Taylor, who was seised of certain lands in Brecknockshire in *Wales*, a few years ago thought proper to make a conveyance of them to William his son in fee, rendering an annuity of 37 *l. per ann.* to himself for life, and 10 *l. per ann.* to Judith his wife for life; under this conveyance William, the son, entered into possession, and for some time paid the annuity both to his father and mother, On Lady-day, 1736, William the father gave a receipt to William the son for six pounds five shillings, in full for that quarter of his annuity, which was due at that day. William, the son, acknowledged by his answer, that there were other little money transactions between his father and him, and that at divers times he had borrowed small sums of his father, but he swore these sums of money were all discharged: In April or May, 1736, William, the son, made his father another payment of about 5 *l.* very soon after, William, the father, died, and left Brace his executor; the present bill was brought by Brace against William the son, praying, amongst other things, that William the son might pay to Brace what was in arrear for the father's annuity at the time

Where a matter, which arises within the jurisdiction of the courts of *Wales*, is of value or difficulty, parties may take their remedy here, but if of small consequence, it is an inducement with this court to dismiss the bill with costs,

of

BRACE V.
TAYLOR.

Tho' a defendant has not demurred to a bill, as being too trifling for this court to entertain, yet he may take advantage of the objection at the hearing; for a bill may have been so drawn, as to have prevented a demurrer.

of his death, and that he might come to an account with for what other money he owed him on the account of his father.

Lord Chancellor said, his opinion was, that the bill ought to be dismissed with costs: he said this was a question which was within the jurisdiction of the courts of *Wales*; and tho' there was not a reason to prevent the parties from taking their remedy in this court, where the matter in question is of great value and difficulty, yet, where the dispute relates to a matter of consequence, that is an ingredient which this court ought to consider (1); one objection, therefore, which the counsel for the defendant have made in the present case, is, that the matter in question appears to be of small and trifling consequence, the defendant has not demurred to the present bill on that account; yet that objection may be taken advantage of now at the hearing, for it very often happens, that a bill may be drawn in such manner as to prevent a demurrer of this sort, especially in a matter relating to an account, and therefore it would be very reasonable, that an objection of this sort might not be taken at the hearing. In the time of Lord *Harcourt* a bill was brought into this court relating to tithes; it was clearly admitted that the plaintiff had a right to some tithes of the defendant; but, as the tithes which were due appeared to be only of the value of 60 pounds, the Chancellor dismissed that bill at the hearing; is the nature of the present case? Here is a bill brought to have a decree made for the payment of the arrears of an annuity which were incurred in the life of the plaintiff's testator.

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A receipt is produced on the part of the defendant, whereby it appears, that at *Lady-day*, 1736, he paid his father 6*l.* 15*s.* one quarter of his annuity, due at that time; this is an evidence that there were no other arrears of the annuity, and the father died within a little more than three months after; so that at the time of his death there could have been but one quarter that was in arrear, and that so small a sum as 6*l.* 15*s.*; but then it has been said, that the defendant has admitted by his answer, that at different times borrowed small sums of his father, and though he does swear he has discharged those sums in his father's life; yet it has been urged, that this is a ground for directing an account to be taken, and upon the account it may come out, that there was so much money owing from the defendant to his father, that, together with the 6*l.* 15*s.* before mentioned, it will amount to a sum for which this court allows a bill to be brought, and it is indeed true, if the defendant had acknowledged, in his answer, any particular sum due, though he swears that those sums were discharged, yet it is still a ground for directing an account to be taken; but, in the present case, the defendant has made an acknowledgment which he has made is, that there were small sums of money, which he at different times borrowed of his father, as the plaintiff has made no proof what those sums were, as the defendant has sworn he has discharged them, there is no foundation for directing an account to be taken relating to

If a defendant, by his answer, acknowledges any particular sum due, tho' he swears that those sums were discharged, yet it is still a ground for directing an account.

(1) *Vide Owens v. Smith, Com. 715. Anon. Bumb. 17.*

sums, and this made the more clear, by reason of a piece of evidence produced on the part of the defendant, by which it appears, about *April* or *May* following, he paid his father about five pounds, which might probably be the discharge of these sums mentioned in his answer, and there is no occasion to apply that payment to the annuity; these are reasons to shew, the plaintiff had no ground to come into this court, and his natural remedy was a distress, or an action of covenant upon the deed: "And his Lordship declared, he saw no cause to give the plaintiff any relief in equity, and ordered the plaintiff's bill to be dismissed out of court with costs."

BRACE V.
TAYLOR.

Young versus Peachy, February 11, 1741 (1).

Case 198.

SIR Robert Bredon, on the 21st of *January*, 1719, made his will, and thereby gave certain houses in *Bond-street* and *Old-street*, of the value of about 340 *l. per ann.* to *Zaccheus* his son for life, the remainder to the first and other sons in tail, remainder to his daughters and the heirs of their bodies; and, in case of such daughter or daughters dying without issue, then to the survivor or survivors of their heirs.

Where a father obtained an absolute conveyance from a daughter, in order to answer one particular purpose, and afterwards makes use of it for another, this court will relieve under the head of fraud (2).

this court will relieve under the head of fraud (2).

Sir Robert Bredon died, and upon his death, *Zaccheus* entered into possession of the tenements both in *Old-street* and *Bond-street*. *Zaccheus* had no sons, but had issue two daughters, *Margaret* and *Lydia*; *Margaret* intermarried with Mr. *Joseph Fox*, and the plaintiff *Lydia* intermarried with Mr. *Young* in 1726. *Joseph Fox* was in very bad circumstances, and one *French*, examined in the cause, swore, that about that time he heard *Zaccheus* complain of *Joseph's* extravagancies, and saying, that if he was to die, *Joseph* would waste all that would come to him, for which reason he would endeavour, for a little matter, to get *Joseph* to join with him to bar the estate-tail in that moiety which he would be intitled to, in order to protect the estate from his creditors.

Leman v. White
J. Russell. Lr
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Highton v Hogg
157 Beau. 2;

And, with this intent, "*Zaccheus* represented to his daughter *Margaret*, that it was probable he should not have any more children, and that it would be for her benefit to join in a common recovery of a moiety of the premises so limited in remainder in tail to his daughter, and desired her to persuade her husband to join in the same, and that thereby, and by a deed to be made thereupon, declaring such recovery to be to the use of *Zaccheus* and his heirs, this moiety would be protected from the creditors of *Joseph Fox*, and at the same time promised *Margaret*, that he would take the estate so to be created by the recovery, and deed to declare the uses thereof, as

(1) *Reg. Lib.* 13. 1741. fol. 119.

1 *Ves.* 19. *Kinchant v. Kinchant*, 1 *Bro.*

(2) *Vide Tendril v. Smith*, ante 85.

Cha. Rep. 369. 374. *Hawes v. Wyatt*, 3

Hawes v. Heron, ante 161. *Cory v. Cory*,

Bro. Cha. Rep. 156.

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PEACHY.

" a trustee only for her and her heirs, and that the operation of
" law would be such thereupon, he not paying any consideration
" for the same, and that he would not claim or insist upon any
" benefit or advantage thereby."

A recovery was accordingly suffered of this moiety in *Hilary* term, 1726, in which *Zaccheus* was tenant to the *precipe*, and *Margaret* and her husband were vouched, and a deed was perfected, to which they were parties, and the recovery was thereby declared to be to the use of *Zaccheus* and his heirs, but no consideration whatsoever was paid by *Zaccheus*, or any other on his behalf, to *Margaret* and her husband.

Soon after *Joseph* and his wife, on account of other circumstances, were forced to go to *South Carolina*, in order to secrete themselves from their creditors.

However *Zaccheus*, from the time the recovery was suffered, constantly paid to *Margaret* an annuity of thirty pounds *per ann.* Afterwards *Zaccheus* had the misfortune to become a bankrupt, and Sir *Robert Peachy* and others were chosen his assignees: *Zaccheus* died in *March*, 1734, and *Joseph Fox* in *August*, 1735, and his wife some few days after died without issue, without having made any disposition of this moiety: The present bill, brought by *Young* and *Frances* his wife, against the assignees of *Zaccheus*, and against a mortgage of this estate, under a mortgage from *Zaccheus*, after he got possession of this moiety under the recovery, praying, amongst other things, that the recovery might be set aside as being unduly obtained, and that in consequence of this the plaintiffs might be allowed to redeem the mortgage, as this moiety is descended and of right belongs to the plaintiff *Lydia* and her heirs.

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Upon the hearing of this case, Lord Chancellor asked the counsel for the plaintiffs, whether they were willing to consent that the 30*l.* *per ann.* which *Zaccheus* had paid to *Margaret* should be refunded. and upon their declaring that they were, Lord Chancellor said, his opinion was that the recovery ought to be set aside as being unduly obtained, and, in consequence of this, that the plaintiffs were intitled to redeem this mortgage. He said the state of the case was no more than this: Sir *Robert Bredon* gave his estate by his will to his son *Zaccheus* for life, the remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, the remainder to his daughters and their heirs, as tenants in common: Sir *Robert Bredon* died, and on his death *Zaccheus* entered into possession, and had only two daughters, so that he was tenant for life, with remainder to them in tail: *Zaccheus* joins with *Margaret*, one of his daughters, and her husband, in suffering a recovery of a moiety of the premises; by the uses of this recovery, *Zaccheus* is made the owner of this moiety in fee: in the deed which declared the uses, the consideration is recited to be for barring all entails in the premises, and the remainder and reversion expectant thereon, and in consideration of five shillings, and, as the deed says, for divers other valuable and good considerations; as the
consideration

consideration is so loosely expressed, in point of law, it leaves it open to the parties to aver any other consideration; and the question is, whether, in the present case, there is not room for a court of equity to say, that here is either a trust resulting by operation of law for the benefit of the daughter that joined in suffering this recovery; or whether there is not a ground, in the present case, to direct that the assignees, under the commission of bankruptcy which issued against *Zaccheus*, shall execute a reconveyance under the head of fraud.

With regard to the trust by operation of law, it has been urged on the part of the plaintiffs, that there is such a one in the present case, because, though in point of law there is a consideration appearing on the face of the deed, yet it is insisted, that here is no valuable consideration to prevent a trust arising by implication.

LORD CHANCELLOR,

Now as to that, I am of opinion that there was no such trust; for if a trust by implication was to arise in the present case * it would be to contradict the statute of frauds; for it might be said, in every case, where a voluntary conveyance is made, that a trust shall arise by implication; but that is by no means the rule of the court (1); trusts by implication, or operation of law, arise in such cases, where one person pays the purchase money, and the conveyance is taken in the name of another, or in some other cases of that kind (2); but the rule is by no means so large as to extend to every voluntary conveyance; for these reasons, his Lordship said, that the plaintiffs could not be relieved under the notion of a trust; however, he thought that they had a proper ground to be relieved upon under the head of fraud.

Trusts by implication arise where one person pay the purchase money, and the conveyance is taken in the name of another; but the rule is not so large as to extend to every voluntary conveyance.

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It manifestly appears, the conveyance from *Fox* and his wife was obtained in order to answer one particular purpose, but that the father has attempted to make use of it for a very different one; and there have been a great many cases, even since the statute of frauds, where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud which this court ought to relieve against, the doing it is *dolus malus*, and that appears to be the present case; This may be collected from the evidence of *French* and *Sanguin*; *French* swears, that, before the recovery was suffered, he heard the father say, that his son *Fox* was guilty of great extravagancies; and that if he had the estate, he would certainly waste it, for which reason he would endeavour, for a little matter, to get *Joseph* to join with him to bar the intail in that moiety which he would be intitled to, in order to protect the estate from his creditors; what *Sanguin* swears, was subsequent to the recovery, and therefore I do not lay so much weight upon it.

A court of equity will never suffer a deed of this sort to stand: in 2 *Vern.* 307. *Wilkinson* versus *Brayfield*, there is a case which

(1) *Fordyce v. Willis*, 3 Bro. Chs. Rep. 577.

(2) See *Lloyd v. Spillet*, ante 150. notes.

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is material to this purpose ; there it is stated “ The defendant “ *Brayfield* having, by the means of *Figg* an attorney, prevailed “ upon *Elizabeth Corey* to levy a fine of some houses in *Norwich*, “ and to execute a deed, leading the uses thereof to *Brayfield* and “ his heirs ; and it being proved that she, at the time of levying “ the fine, declared she must make use of some friend’s name in “ trust ; and afterwards by will declaring she had levied such “ fine only in trust, and the better to enable her to dispose of the “ estate, and thereby devised it to *Wilkinson* and his heirs, sub- “ ject to the payment of her debts ; and although *Brayfield* “ proved a great familiarity and friendship between him and “ *Elizabeth Corey*, and that she had declared he should have her “ estate ; yet it was decreed, not only that the estate should be “ liable to the creditors’ debts, but that he should convey the “ estate to the devisee *Wilkinson* and his heirs.” It has been said, in the case which has been cited, here were two different declarations of the uses of the fine, contrary one to another, and likewise there were creditors in that case, and therefore those might be reasons for that determination : but I do not think they were ; and it seems to me that case was something similar to the present one ; it is indeed true, in the present, the defendants are assignees under a commission of bankruptcy, which issued against *Zaccheus*, but they can be in no better case than *Zaccheus* himself would have been.

The present case is a good deal like one which I very well remember, and was to this purpose : A man intended to make a mortgage of his estate by two different deeds, the one an absolute one, the other a defeasance upon payment of the mortgage money, which was the old way of making mortgages (1) ; he executed the absolute conveyance, but when he had so done, the other party refused to execute the defeasance, but the court, without any difficulty, decreed him to do it (2) ; his Lordship said, that other cases of the like kind have been likewise cited, where conveyances have been made of estates in trust, in order to screen them from forfeitures for felony, and those conveyances have been set aside, but his Lordship said he would not make any particular observations upon those cases.

In the present case the recovery, as has been said, was suffered for one purpose, and is attempted to be made use of for another, and though it has been objected the allowing the evidence of this sort is against the statute of frauds and perjuries, yet, if that objection should be allowed, the statute would tend to promote frauds rather than prevent them ; for these reasons therefore I declare, though there had been no other circumstances in the case, I should have been of opinion that the recovery ought to be set aside.

But the case is greatly strengthened when it comes to be considered that this was a recovery obtained by a father from his child, and when that is the case, it affords another strong circumstance, in order to relieve the plaintiffs.

(1) *Ca. temp Talb.* 64. (2) *Walker v. Walker*, ante 99. note 2.

the case of *Gliffen* and *Ogden* before Lord Chancellor *King*, circumstance was strongly relied upon; but his Lordship refused to give relief, for he said it was a fair bargain between a father and his child, and he would not weigh in golden scales, whether the consideration was exactly equal or not: In *March* there was an appeal to the House of Lords from that decree; upon the appeal, the Lords laid great weight upon that circumstance, that the conveyance was obtained * by a father from a daughter in distress, and the decree of Lord *King* was reversed: It is indeed true, from the time the recovery was suffered, *Zaccheus* paid to his daughter 30*l. per ann.* and at the time the recovery was suffered, he seems to have an intention of doing so. But the moiety of this estate is of the value of 140*l. per ann.*; and therefore those sums of money can by no means be a sufficient consideration: However, on the other hand, it is reasonable this conveyance should stand as a security for the money which *Zaccheus* had so advanced to his daughter; and that was the reason I asked whether the counsel for the plaintiff were willing to consent to refund this.

Upon the whole, his Lordship declared, "that the plaintiff ought to be relieved against the declaration of the uses of the recovery made to *Zaccheus Bredon* and his heirs, by the deed of the 16th of *July*, 1726; upon making an allowance to the assignees under the commission of bankruptcy against *Zaccheus* or the 30*l. a year* paid by him to his daughter *Margaret*; and was further ordered that the assignees do convey to the plaintiffs *Francis Young*, and *Lydia* his wife, and the heirs of his wife, the moiety of the said estate; and upon payment by the plaintiffs to the mortgagee of his principal, interest, and costs, he was ordered also to reconvey the mortgaged premises to the plaintiffs, whom his Lordship directed to be admitted creditors under *Zaccheus's* commission, for what they shall have paid to the defendant the mortgagee."

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Lord *King*, in the case of *Gliffen* versus *Ogden*, refused to give relief on a conveyance obtained by a father from a child; the House of Lords upon an appeal laid great weight upon that circumstance, and reversed the decree.

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Forster versus *Forster*, *March* 10, 1741 (1).

Case 199.

HARLES Forster, the father of *John* and *Francis Forster*, made a settlement, upon the marriage of his eldest son *John* a freehold church lease, held by the lives of *Frances* the wife of *Charles*, and *John* the son, and *Gabriel* a third son, in trust, to permit the said *John* to enjoy for his life, and then his intended wife for life, and after being subject to a charge for younger children's portions, in trust for the heirs males of the body of *John Forster*, and in default of such issue, in trust for the heirs males of the body of the said *Charles Forster* the father, and in default of such issue, to the right heirs of the said *Charles Forster* (3).

As a tenant for life, and the person in remainder next in limitation, of a freehold lease may certainly join, and bar the next in limitation, so he who had both the interests in himself, may also bar the entail of such a lease (2).

1) Reg. Lib. A. 1741. fol. 449.

3 P. W. 10. n. 1. Har. Co. Litt. 20. a.

2) So Norton v. Frecker, ante 1 vol. n. 5.

3) Saltern v. Saltern, post. 376. Wil-

(3) There were some other limitations, but these the most material.

n v. Jekyl, 2 Ves. 681. Blake v. Blake,

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Ben n Allen
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The said *Charles* the father being dead, and the wife of *John* being dead, and the only son of *John* by his said wife being also dead, and there being daughters of the marriage, the defendant *Catherine*, and two other daughters of *John*, made a settlement of the church lease, under which the defendants claimed, and levied a fine *sur concessit*, and afterwards died without male issue.

Upon the death of *John* without issue male, the plaintiff *Francis Forster*, claimed title to the leasehold premises, insisting, that, by this settlement, *John*, his elder brother, was only tenant for life, and that the limitation to the heirs males of his body were words of purchase, and created a contingent remainder to his heirs males, and that the limitation to the heirs males of the body of his father *Charles* was a contingent remainder, to take effect in the person who should be the heir male of the body of the father at the time of the death of *John*, and that *John* could not be the heir male of the body of his deceased father, within the meaning and operation of the deed, because a life estate was expressly limited to him, and in the case of a descendible freehold it vests in the heir, not as heir, but as special occupant; and that *John* could never take as occupant under the description of heir male because the occupancy could not arise till after his own death and therefore, that the heir male, who was to take the contingent remainder, must be the plaintiff, (*viz.* the heir male of *Charles* the father, at the death of *John* the tenant for life), and that if *John* was but tenant for life, his settlement and fine *sur concessit* could not bar the contingent remainder which ought take place in the plaintiff.

E contra: It was insisted, that the limitation to the heirs the body of the father was not a contingent remainder, but words of limitation of the estate, and must mean the heirs male at the death of *Charles* the father; that *John* was the heir male, being the eldest son, and that his wife being dead, and his son being also dead, his life estate, and the limitation to him as heir male were united, and in case of an estate of inheritance, he would be tenant in tail in possession; and in case of a descendible freehold he had the whole interest in him, and might dispose of it as pleased, and bar the plaintiffs.

Lord Chancellor was of this opinion; and said, as tenant for life, and the person in remainder, in nature of a tenant in fee of a freehold lease, could certainly join, and bar the settlement; so the same person who had both these interests in himself, *John* certainly had, might also bar the intail of the freehold lease.

A second son, tenant for life of a freehold lease, remainder to the heirs of the body of the father, the tenant for life, and the elder brother may bar the intail.

And though it seemed absurd, that the person who had an estate for life should also be the occupant, which occupancy in strictness did not arise till the death of the tenant for life, yet, in reality, the limitation, which in the case of an estate of inheritance would create an estate-tail, does, in the case of freehold, give the party the whole interest, so as to empower him to dispose of it; and he principally relied upon it, that the son of *John* being dead, and the remainder to the heirs males of *Charles* the father vesting thereupon in *John*, to whom the estate

for life was limited, he is to be considered in nature of tenant in tail, and might dispose of it; and put this case, Suppose a second son tenant for life of such a freehold lease, remainder to the heirs of the body of the father, the tenant for life, and the elder brother the heir male of the father, might certainly bar the entail, and therefore where the same right is in one and the same person, he could certainly do it.

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N. B. As to descendible freeholds, *vide* 10 Co. 96. *Edward Seymour's case*, 1 Roll. Abr. 676.

As to intails of freehold leases, *vide* *Wasteneys versus Chappel*, decreed by Lord Harcourt 1712. 3 Wms. 265. and the *Duke of Grafton versus Sir Thomas Hanmer*, 3 Wms. 266.

As to the heirs male being words of purchase, *vide* *Peacock versus Spooner*, 2 Vern. 43 (1), and *Dafforne versus Goodman*, 2 Vern. 362.

(1) *Vide* *Webb v. Webb*, 1 P. W. 132. 2 Ves. 237. 660. *Hedgson v. Bussy*, ante 89.

Dennis Daley, Esq; and Lady Ann his wife versus Sir Edward Case 200. *Desbouverie, and others*, 1738.

L'Esneur v. Bua
Desbouverie

MR. Smith had two daughters, the Countess of *Clanrickard*, S. C. 4 Burr. 2055. S. C. 2 Ves. 535. and Lady *Desbouverie*; in 1714 he settled a house in *Ormond-street* and some leasehold estates in trust for Lady *Clanrickard* for life, and to such person as she by writing should appoint; by his will July the 7th, 1718, he gave a legacy to the plaintiff *Ann*, eldest daughter of Lady *Clanrickard*, of 1000*l.* at 21, or marriage, with interest at 4*l.* per cent. to *John* her brother 1000*l.* at 21; if one died, the whole to the survivor, and the residue of his real and personal estate to the trustees, in trust as to one moiety for the sole and separate use of Lady *Clanrickard*; and by a codicil he directs that in case the plaintiff *Ann* should marry in the life-time of the Countess, without her consent, that the plaintiff's legacy should be divided among the rest of Lady *Clanrickard*'s children; Mr. *De Golls* was the surviving trustee: the testator died, and the Earl of *Clanrickard*. On the 1st of August, 1732, Lady *Clanrickard* makes an appointment of her house and the leasehold estates to Smith Earl of *Clanrickard* for life, and to his first and other sons in tail-male, to daughters in tail-general, remainder as to one moiety of the freehold to Plaintiff *Ann* for life, and to her sons and daughters in tail male, remainder to Lady *Mary Burke*; as to the other moiety in the same manner with cross remainders; and by another deed-poll, of the same date, appoints Mr. *De Golls* to assign the real and personal estate devised by her father to the same trustees, Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward*, and their heirs, in trust to sell and lay out in lands, and settle to the same uses as the freehold by the last deed, and till so invested, to be placed out to interest, and be applied for the benefit of the persons entitled to the rents and profits of the estate: In both deeds is the following proviso, that if her son the Earl of *Clanrickard*, the

Whether conditions be precedent, or subsequent, if they are in restraint of marriage, the court have always put a favourable construction upon them to prevent a forfeiture. Where there is no objection to the person or estate of the gentleman who proposes, and the young lady herself is inclined to the match, trustees should consider themselves in the light of a parent, and readily come into a consent.

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Evans
St. Muel 12

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plaintiff *Ann*, and Lady *Mary Burke* should marry without the consent of Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward*, or the major part of them, or the survivor of them, if any of them should be then living, that then he, she, or they, marrying without such consent, and his or their issue, or descendants, should forfeit or lose all his, her, or their right to the premises; and the next person in remainder, pursuant to the appointment aforesaid, should and might in such case enter thereunto, and enjoy the same as if he, she, or they so marrying without consent as aforesaid, was or were actually dead without issue: by her will she confirms the deeds poll, and makes Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward*, executors and residuary legatees on the same uses, and also guardians to her children: on the first of *January*, 1732, the Countess died; and on the 9th of *July*, 1734, Mr. *De Gills*, pursuant to a decree in Chancery, assigned all the trust estates to Sir *Edward Desbouverie*.

In 1734, a treaty of marriage was proposed by and between the plaintiffs, and after it had been carried on about five months, the plaintiff *Daley* acquainted Sir *Edward Desbouverie* with his intentions: upon which Sir *Edward* took down in writing from *Daley's* mouth the following proposal for a settlement on the marriage: 4000 acres of land in *Ireland* worth 1200 *l. per ann.* of which six hundred pounds *per ann.* were proposed to be settled in present for their maintenance, the remaining 600 *l. per ann.* in reversion after the father's death; in case she is a widow, and has issue, 500 *l. per ann.* in case she has no issue 600 *l. per ann.* jointure, her own fortune to be settled together with the 1200 *l. per ann.*

Sir *Edward Desbouverie* communicated the proposal to *Manley* and *Ward* the next day, who did not approve of it, in regard Mr. *Daley*, the father of the plaintiff, was to have the interest of the plaintiff *Ann's* portion, which was about 8000 *l.* for his life: the trustees agreed at that meeting not to consent, unless the plaintiff *Ann's* fortune was settled with the 600 *l.* a year for the present maintenance of the plaintiffs; on the 29th of *May*, 1735, Mr. *Manley*, at the request of the other trustees, transmitted the said proposal (which had been before delivered to the trustees in writing and signed by the plaintiff *Daley*) to Mr. *Taylor*, by letter, who was guardian to the present Earl of *Clanrickard*.

The letter in substance as follows:

[263] We take the liberty to give you some further trouble in relation to Lady *Ann*, who we find has an inclination to marry the son of Mr. *Dennis Daley*; the young gentleman has sent the inclosed proposals to Sir *Edward Desbouverie*; as we are intire strangers to Mr. *Daley*, we desire you may inquire into his circumstances, and how far he is able to make the settlement proposed by his father, and if his father should desire to treat, it is our opinion my Lord's counsel should be consulted thereupon. Lady *Ann's* fortune at present is from her grandfather *Smith* about 3400 *l.* besides what was left by her father out of his *Irish* estate, which will make the whole as we compute upwards of 7000 *l.* and she has a further expectation of

rectancy, in case of my Lord's death, of a moiety of what my
Lady Clanrickard left my Lord, if she marry with our consent;
 not, she will lose it, and the whole will go to her sister, unless
 should likewise marry without our consent, in which case the
 whole goes to Sir *Henry Parker*; this is all the influence we have
 from *Lady Ann*, and she might with her fortune marry much
 better: yet if Mr. *Daley's* father will make the settlement pro-
 posed, we believe the young folks are too far engaged for us to
 attempt to break off the match, and therefore we shall be obliged
 to consent to it. *Lady Ann* very soon after her mother's death
 went to her father's relations without our privacy or consent, and
 so far they may have perverted her we cannot tell, but she and
 the young gentleman both declare themselves protestants, and say
 that this is the reason my Lady's father's relations are against the
 match: We are your most humble servants, *John Manley, &c.*
 London, the 29th of May 1735.

Postscript; The above letter was prepared for all the trustees to
 sign, but Sir *Edward Desbouverie* going out of town in a hurry,
 directed I would forward it to you.

Mr. *Taylor*, in answer to this letter, on the 18th of June
 sends the trustees the following proposal from Mr. *Daley* the
 plaintiff.

4000 acres of land to be settled to the use of *Dennis Daley*,
 senior, for life, remainder to *Dennis Daley, junior*, for life, with
 remainder to his first and every other son in tail; the said *Dennis*
Daley hath agreed that he will lay out the portion at interest, or in
 purchase of lands which shall be settled to the same uses, 600*l.*
per ann. present maintenance, 600 *l. per ann.* jointure, if no issue,
 or if issue 500 *l. per ann.*

It appears by a letter from Sir *Edward Desbouverie* to Mr.
Manley, that all the trustees refuse to consent on any other terms
 than *Lady Ann's* portion being settled with 600 *l. per ann.* for
 her present support and her jointure; and the reason they give
 is that if the father of *Daley* should have the interest of *Lady*
Ann's fortune, which at 6 *l. per cent.* the common interest in
 the land, produces 540 *l. per ann.* he in effect parts with nothing
 present.

The plaintiff Mr. *Daley* applied several times afterwards to Mr.
Manley for his consent, but he told the plaintiff he thought the
 trustees insisted on by him and Sir *Edward Desbouverie* and *Ward*
 were reasonable, and that he never would give his consent on any
 other terms, and cautioned the plaintiff against the ill consequences of
 trying without the consent of the three trustees; and told
 him if he would consult counsel, and they should be of opinion
 that it was insisted on by the trustees was unreasonable, he would
 be ready to submit, but not otherwise.

It appeared in evidence that the plaintiffs were married by *John*
Manley, the famous *Fleet* parson on the 5th of June 1735.

The plaintiff *Daley* never applied to the trustees *Manley* and
Ward for their consent till he had been married some time.

The bill is brought to compel Mr. *Daley* the father to a speci-
 fic execution of the marriage agreement, or such other reason-
 able

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DESBOUVIERE.

able settlement as this court shall direct may be executed by him : that the trustees may join in the settlement, or sign their consent, so as to prevent a forfeiture, and that they may execute the trusts in the two deeds poll.

The two material points for the defendants the trustees were, First, Whether what the trustees have done amounted to a consent to the marriage of the plaintiffs.

Secondly, If the trustees have done amiss in refusing their consent to the match.

On the 11th of December, 1738, Lord Chancellor gave judgment.

That the marriage of the plaintiffs was substantially with the consent of the trustees.

First question, Whether the condition annexed to the power is such a condition as Lady Clanrickard could annex.

Secondly, Whether there is evidence sufficient on the part of the plaintiffs to shew, that their marrying was with the consent of the trustees.

As to the first, I think Lady Clanrickard had a power to annex this condition.

As to the second, I think the condition has been well performed (1).

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The proviso in both the deeds is very harsh and unreasonable, and therefore a court of equity will be justified in taking as great a latitude as may be in the construction of it, to prevent a breach: if the marriage was such as was fit, there could be no objection either to the person or to the estate of the plaintiff Mr. Daley; neither was it a disparaging settlement: it appears through the whole cause that the Lady had a strong inclination for the match, and therefore in such a case the trustees should have considered themselves in the light of a parent, and should have readily consented.

It is manifest both from the letter and disposition of Mr. Manley, one of the trustees, that he agreed to the proposal, and gave his consent that it should be a match; and the letter is likewise evidence that the trustees in general approved of the person, behaviour, and quality of Mr. Daley; and it is also evi-

(1) As conditions in restraint of marriage are not considered in a very favourable light, the court has dispensed with the want of circumstances, where the condition has been performed to a reasonable intent; as where the major part of the trustees or guardians consent. *Harvey v. Aston*, ante 1 vol. 375. *Wiseiman v. Foster*, 2 Ch. Rep. 23. Where trustees have given a conditional consent, that has been deemed sufficient to prevent the forfeiture. *Daley v. Desbouvrie*, supra, 4 Burr. 2055. S. C. 2 Ves. 535. So where trustees give an implied or tacit, not an express consent. *Messers v. Messers*, 2

Vern. 580. *Harvey v. Aston*, ante 1 vol. 375. Quære whether the same observations apply to a subsequent consent. *Vide Burleton v. Humphries*, 4 Burr. 2056. *Amb.* 256. S. C. *Reynish v. Martin*, post. 3 vol. 331. So where a father or guardian at first encourages proposals, but before the marriage takes place, denies his consent. *Campbell v. Lord Netterville*, 2 Ves. 534. *Lord Strange v. Smith*, *Amb.* 263.

The reader will find a few observations on conditions in restraint of marriage in a note at the end of the case of *Harvey v. Aston*, ante 1 vol. 361.

ence of their consent to the marriage, provided Mr. Daley the other will make the settlement he proposed.

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The words in the letter, *we shall be obliged to consent*, mean from the necessity of the thing, and for the happiness of the lady, and ought to be construed a present consent, that, if the other would make the settlement, they would not break the match.

Trustees saying in a letter *we shall be obliged to consent*, for the happiness of the Lady, will be construed a present consent.

I have been considering of the evidence of the consent.

As to conditions whether precedent or subsequent, where they are in restraint of marriage, the court have always put the most favourable construction upon them, to prevent a forfeiture; and for this purpose *Farmer versus Compton*, 1 Ch. Rep. 1. is a very strong case, and *Boslock and Ireton*, 2 Ch. Rep. 13. under the names of *Wifeman contra Foster*, before Lord Nottingham, is a case in point.

The trustees have signified their consent that a settlement should be made according to the prayer of the plaintiff's bill.

And therefore I will decree accordingly (1).

(1) *Reg. Lib. A. 1738. fol. 320.*

Meure versus Meure, at the Rolls, May 16, 1737.

Case 201.

ABRAHAM Meure being seised of several messuages, lands and tenements in *Surry* and *Suffolk*, on the 18th of *February*, 1731, made and duly published his last will, and did thereby devise all the said lands in the said counties to *John Knight* of *Wimborne*, Esq; since deceased, and to the defendant *Andrew Meure*, and to the survivor of them, and to the heirs, &c. of each survivor, in trust to sell the same as soon as conveniently may be after his decease, and with the money arising by the sale, to purchase other freehold lands, or long annuities, or stock, or some other publick fund, as the trustees should think fit; and then in trust to permit the defendant *Andrew Meure* and assigns, to receive to his and their own proper use the interest and profits thereof during his life; and the testator did further direct that the defendant *Andrew Meure* should receive the rents and profits of the said estates till sold to his own use, and after the defendant's decease, then in trust to permit the plaintiff and assigns to receive the interest and profits of the said money as aforesaid, or the rents and profits of the said land if unsold, or of other lands as should be purchased during his natural life, and after his decease, then in trust for the use of the issue of the body of the plaintiff lawfully begotten; and in default of such issue, the testator devised the principal and interest arising by sale of his said estates; or his said estates, if unsold, to *John Knight* for his life, and after his decease to the defendant *Peter Meure*, and his heirs for ever.

To one for life, and to the heirs of his body, has always been held to be an estate-tail; but where it is to one for life, and after his death to the issue of his body, there is no instance where it has been so construed (1).

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Rockford
Schymansse
2 (Dn. Thawen)
Bowwell
v
(Dillon)
1 (Denny. 8.)

(2) *Vide Bale v. Coleman*, 1 Cox's P. W. 142. note 2.

MEURE V.
MEDAL.

Mr. *Knight*, one of the trustees under the will, died before the estates were sold, but proved the will with *Andrew Meure*, the other executor.

The bill was brought by *Isaac Meure*, the natural son of the testator to have the estates sold by a decree of this court, and that the money arising thereby may be disposed of according to the will, and that the defendant *Peter Meure* may set forth whom he claims under, and what, in the said premises.

Master of the Rolls. This is a very particular case.

By the death of Mr. *Knight* the power devolves upon the court in what manner to lay out the money.

It must be a purchase of lands which only are capable of carrying all the remainders.

The principal question in this cause is, whether an estate-tail is to be limited to the plaintiff, or an estate for life only.

Where lands are to be settled to one for life, and to the heirs of his body, there is no case where such a limitation has not been held to be an estate-tail: on the other hand, there is no case where it is to be settled to one for life, and after his death to the issue of his body, that such a limitation has been construed an estate-tail.

In the case of *Sweetapple* versus *Bindon*, 2 *Vern.* 536, there was no estate for life particularly given before the word *issue*, which differs it from the present case; and yet Lord Keeper *Wright* said upon the like words in marriage articles, it would not have been construed an estate-tail, when it appeared the estate was intended to be preserved for the issue. *Vide the case of Bale* versus *Coleman*, 1 *P. W.* 142. where it is laid down, that there is a difference between a deed and a will, as to construction.

There is something in this will that denotes the intention of the testator, that the plaintiff should only take an estate for life, for there is a distinction between the wording and framing of the limitations: In the first place, the estate is during the lives of the defendant *Andrew*, and the plaintiff, to continue in the trustees; and when the testator limits it to the plaintiff for life, it is to permit and suffer the plaintiff to receive the rents and profits, &c. and when the limitation is to the issue, it is to their use and behoof, and the court should, as much as they can, preserve the intention of the testator.

The words, *in default of such issue to Peter*, shew the testator intended that *Peter* should not take while there was issue of *Isaac*: *issue of his body* takes in both male and female, and there must be cross remainders to the issue female.

Lord *Glenorby* versus *Bosville*, *Cases in Chancery in Lord Talbot's time*, 3, is in point*; and I shall in this case make my decree accordingly (1).

* There a devise to trustees in trust for *A.* for life, without impeachment of waste—voluntary waste in houses excepted, remainder to the issue of her body, &c. was construed only an estate for life *sans waste*, and a strict settlement decreed.

ry versus Countess Dowager of Oxford, March 2, 1741. Case 202.

HERE a mortgagee is made a party to a bill, praying relief is the same thing as praying to redeem, for redemption is the proper relief; and if upon a reference to a master, that is due for principal, interest, and costs, they do not the mortgagee, the court will, at his application, dismiss as against him, which is equivalent to decreeing a foreclosure. Praying relief where a mortgagee is a party, is the same as praying to redeem; and if, on a reference to a master, they do not redeem him, the court will dismiss the bill, which is equivalent to a foreclosure.

Brudenell versus Boughton, March 5, 1741.

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Case 203.

THE questions in this cause arose on the wills of Mr. *Cole & Turner* *Richard Boughton*, the brother of the defendant. *to Russell. 376.* His first will was dated *October* the 12th, 1738. The questions were, Whether the legacies given under a first will in the name, &c. I *Richard Boughton* of, &c. do give and my wordly estate as follows :

a charge upon the real estate, and whether revoked by a second? Lord *Hardwicke* decreed either sums to be raised out of the real estate of the testator.

First, I give and devise to my sister *Elizabeth Brudenell* the *to Russell. 375.* 800*l.* to be laid out for the advantage of herself during her life, and afterwards to her children; and likewise I beg she will take the advice of my executor. *Mitchell*

I give to my sister *Meliza Layng* the sum of 400*l.* to be paid in the same manner, and to the same purpose as Mrs. *Scarse* *2 M. Craig. 695.* *W's.*

The testator gives some small pecuniary legacies; and then says in these words :

And I give the remainder of my estate at *Neasham* and *to Russell. 21.* *Radburn* *Leam* *to Russell. 457.* *Richard Boughton*, whom I also appoint my executor to this my will, thereby revoking all others; Witnesses my hand,

Richard Boughton. *to Russell. 479.*

Read and published in the presence of
J. S. H. B. J. C.

A second will was made at *Lyons*, dated the 22d of May, 1741. *Earl of Hardwicke* *Burham* *1 y of Chy 608.*

In the name of God, &c. *Richard Boughton*, Fellow of *All Souls college, Oxford*, make public point this my last will and testament, hereby revoking all former wills. *Locke & James* *11 Nov. 1741. 901.*

First, I give and bequeath to my dear sister *Layng* the sum of 400*l.* Secondly, I give and bequeath to my dear sister *Brudenell* the sum of 400*l.*

Lastly,

BRUDENELL *Lastly, I give and bequeath to my dear brother Shuckborough*
v. BOUGHTON. *Boughton all the rest of my estate, real and personal, and appoint him my executor.*

Signed Richard Boughton.

There were no witnesses; but the whole was wrote with his own hand.

To Shuckborough Boughton, Esq.

I beg to recommend my sister *Brudenell* to your kindness; and besides the legacy left her, I beg you would give to my Godchild 200 *l.* and in case that child should be dead, I desire you may give that sum to her elded son; I desire this only in case you make use of the last will.

Richard Boughton.

Lyons, June 9, 1741.

This bill was brought by Mrs. *Brudenell* and her husband, to have the legacies left to her raised and paid by the defendant, out of the testator's real estate.

The first will was executed by the testator, in the presence of three witnesses, and in every respect according to the statute of frauds and perjuries.

The second was made at *Lyons*, in his last illness, but was not executed according to the statute; alterations are here made in the legacies to Mrs. *Brudenell* his sister, and likewise to Mrs. *Loyne* another sister; and by the last clause, the residue of his real and personal estate is given to the defendant.

The principal questions are, Whether the legacies given under the first will, are a charge upon the real estate, and whether they are revoked by the second will.

It was insisted by Mr. *Smith*, now one of the Barons of the Exchequer, counsel for the plaintiffs, that the legacies are a charge upon the land, and is exactly the same as if the testator had given a part of the land to the legatees, and falls within the intention of the statute.

That the legacies must take place out of the real estate, or be void, because there are not sufficient personal assets to satisfy them, and that giving them out of land and money, a mixed fund, will have the same consideration as if singly given out of land, and for this purpose he cited the case of *Onyons and Triers, Eq. Ca. Ab. 408. and P. W. 343. and Prec. in Chan. 459.*

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Mr. *Joddrell*, counsel of the same side, said that the statute of frauds and perjuries was made upon the plan of the civil law, and that it was drawn by Lord Chief Justice *Hale*, assisted by civilians, and therefore the civil law was of use in determining this question, for which purpose he cited several passages out of the Digest to shew the same solemnity necessary in cancelling, as in making wills.

Mr. *Murray*, counsel for the defendant, said, he never heard that the civilians had any thing to do with the statute of frauds, but only with the statute of distributions.

He insisted that the disposition of a testator is revocable to the end of his death, and that Mr. *Richard Boughton* had wholly revoked the first will; that his intention as to the real estate was the same in the second will as in the first, and his intention as early by the second to revoke the personal legacies given by the first.

*BRIDGEMAN
v. BOURNEMAN.*

That in the Commons, no other will but the last had been admitted to be proved; that the trusts in the former will did never arise, and therefore it is sufficient for the defendant to shew that those are not legacies, because they are clearly revoked.

He put this case as something similar with regard to the courts dispensing with formalities in revocations.

Suppose an estate is mortgaged in fee, or for a term of years; now the interest is vested in the mortgagee, and at law cannot be taken from him, but by reconveyance to the mortgagor, or surrender of the term, which is a necessary ceremony; and yet in this court, if the mortgagor shews that he has discharged the debt, the mortgagee shall be obliged to reconvey or surrender; see the case of *Richards and Syme*, before Lord Hardwicke July the 9th 1740. *Barnard Rep.* 90.

What has been insisted on by the plaintiffs' counsel, that the legacies are discharged as to the personal estate, and yet affect the real, would introduce an absurdity, because the testator intended the real estate to the defendant in both wills.

He said this is not a case to be mooted now at the bar, for he apprehended the point had been determined in *Heyde v. Heyde*, the words of the decree, as mentioned in the report of that case, in *Eq. Cas. Abr.* 409. are, *that such legatees of the personality in the first will as are left out in the second will, must lose them.*

But, in the Register, the words are, *That the legacies devised by the first, and not revoked by the second, were to continue charges upon the real estate.*

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The case of *Onions and Triers* is not applicable; for as the prerogative court have admitted the second will to be proved, it is rejecting the first, and is conclusive as to the personal estate.

That there has been no case cited to shew, that the words *all the rest of my estate real and personal* will extend to affect the real with legacies.

*Bentley v. M.
to Morda
Cole v. T.
to Russell*

Mr. *Smith*, in reply for the plaintiff, drew an argument from the outset of the first will, that by the words *worldly effects*, the land was originally and primarily charged at one and the same time with the personal, and the latter did not come in aid only of the real, and therefore the counsel for the defendant began the question, when they call the personal the original fund, and the land only auxiliary, for they were both primarily charged.

That in the latter clause of the first will, the word legacy (for the words are, after payment made of my just debts and legacies) is applicable to land, as well as personal estate, and for this purpose cited the writ of *ex gravi Querela*, where, though it is a devise

re-
vise

BRUDENELL v. BOUGHTON. wife of lands, yet the word *legatum* is made use of. *Vide The new ed. of Fitzherb. Nat. Brev.* 459, 462. where there is the form of the writ to the mayor and bailiffs of Oxford.

LORD CHANCELLOR,

This is a case of some nicety, and admits of some distinction from all the cases that have been cited on either side.

The *first* question is, Whether the legacies given by the first will, are revoked by the second?

The *second* question is, Whether the lesser legacies under the second will, are a charge upon the testator's real estate?

The testator had a small personal estate, and a real estate; by the first will, which was duly executed, he gives to his sister *Brudenell* 800 *l.* &c. and to his sister *Layng* 400 *l.* and the residue of his real and personal, not before disposed of, after payment of debts and legacies, to the defendant.

[272] By the second will he expressly revokes all former wills (1), and gives to his sister *Layng* only 100 *l.* and to his sister *Brudenell* only 400 *l.* the residue of the estate as before to the defendant; this was not executed according to the statute, but being sufficient as to personal estate, was admitted to be proved in the ecclesiastical court; there is likewise a codicil accompanying it, or, as it is called in the Commons, a testamentary schedule.

The bill is brought by Mrs. *Brudenell* and her husband, to have the legacies given to her under the first will, raised out of the testator's real estate.

This must depend upon the construction of the statute of frauds and perjuries, and the consequences of law arising upon it.

Where a sum of money is given originally out of land, a will with that charge must be equally executed with the same solemnity, because it is considered in this court as part of the land.

It is very certain, no devise of lands can be made, but with such solemnity accompanying the execution of it, as is directed by this act; and it is equally clear, where a sum of money is given originally and primarily out of land, a will with that charge must be equally executed with the same solemnity; because it is considered in this court as part of the land, since it can only be raised by sale or disposition of part of the land; and this is analogous to the rule of law, that a devise of rents and profits is devise of the land itself.

The rule is the same as to revocations of a devise of lands, and a revocation of a sum of money charged on lands, they must be revoked in the same manner.

The rule is likewise the same as to revocations of a devise of lands; and with respect to a revocation of a sum of money charged by a will upon lands, they must both be revoked in the same manner.

There are virtual as well as express revocations, as by extinguishing or destroying the thing devised, which are out of the statute, and remain as they did before.

But then it must be considered that there are different sorts of revocations, or adempments, call it which you will; there are express revocations of the testament or instrument itself, which must pursue the directions of the statute in the sixth section, 1

(1) *Vide Onions v. Tyner*, 1 Cox's P. W. 343. *Finch's Prec. Cha.* 459. S. C. and references.

elling or obliterating, &c. but, besides these express revocations, there are virtual ones, even since the making of the statute; as by extinguishing or destroying the thing devised; and what is done by the testator in his life-time, it must prevail, this is founded upon maxims of law. *Cessante causa cessat effectus, sublato fundo tollitur id quod fundi propter*, therefore these are out of the statute, and remain as they did before.

Suppose a man makes a will according to form, and afterwards sells or conveys away the lands he had devised to other persons, notwithstanding the form of revocation prescribed by statute is not pursued, yet it is a virtual revocation, for it is absolutely necessary a deed should have witnesses, it is good without it.

BRUDENELL
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Suppose a will is made according to form, and afterwards the lands sold and conveyed to others, tho' the form of revocation

the statute prescribes is not pursued, yet it is a virtual revocation.

Suppose, after making a will, a man makes a feoffment to the use of himself and his heirs, it is a revocation (1): Suppose a man charges his lands with a debt, and afterwards pays that debt, it is extinct, and yet here is no formal revocation; or suppose he charges his lands with a portion for his daughter of 100*l.* and gives her the same in his life-time, this is a revocation of the charge, though there is no actual one (2).

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A feoffment to the use of a testator and his heirs, is a revocation; if a man charges his lands with a debt, and afterwards pays that debt, it is

extinct, though there is no formal revocation: lands charged with a portion by a will, and the same by testator in his life-time, is a virtual revocation, though no actual one.

In the present case, this gentleman makes his will, and gives general legacies, which must be taken originally for personalty; the latter words indeed create a charge upon the land, in their primary intention, personal; and, without controversy, if there had been personal assets, they would have been applied, and the land only a collateral security (3); but if the thing secured be taken away, how can the security itself subsist.

It has been said, that the real estate under the first will is to be considered as originally charged: but I am of opinion, that the real estate is not originally charged, but given only by way of security: the case of *Hyde and Hyde* is a case in point; and in those cases, where a man gives a personal legacy charged on real estate, and the will is revoked, the legacies are gone.

In all cases where a man gives a personal legacy charged on real estate, and the will is revoked, the legacies are gone; for where the

real estate is meant only as a collateral security, if the thing secured be taken away, the security itself subsists.

There is more difficulty in the second general question whether the lesser legacies under the latter will are a charge upon the land: and I am of opinion that they are. Consider it in

(1) 1 *Roll. Ab.* 615. 2 1 *Dyer* 143. b. *Hyde v. Fox*, ante 1 vol. 575. *Ben-
vade*, post. 324. *Abney v. Miller*,
598. *Martin v. Savage*, *Barn. Cha.*
189. *Darley v. Darley*, 3 *Wils.* 6.
Amb. 653. S. C. See *Parsons v.*
Wells, post. 3 vol. 741. and notes.

(2) *Bellasis v. Uthwatt*, ante 1 vol. 426. note

(3) *Vide Phipps v. Annesley*, ante 57. *Gaiton v. Hasrook*, post. 424. 439. note *Walker v. Jackson*, post. 625.

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two lights : *First*, As if new legacies were given originally and *de novo* : And *secondly*, Whether they are not part of the same legacies deduced, and newly modified ; it would be a very unfortunate circumstance, if the fund should be gone and taken away.

The words of the second will :

" I give the rest of my estate, real and personal, to my dear brother *Shuckborough Boughton*, and appoint him my executor." *Vide* the second will.

So that the land, as well as the personal estate, is given to the same person that he makes executor : all the legacies considered as *de novo* are charged upon the land.

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Lands charged by will with the payment of debts, all the debts contracted by a testator during his whole life, will be a charge.

When a first will charges real estate with legacies, and a second giving general pecuniary ones, tho' not executed in form, yet the latter legacies will be equally a charge upon the land.

A man may, by way of power, by any writing signed by him, be enabled to charge the land. *Vide Sir Joseph Jekyll's opinion as to such power, in the case of Masters v. Masters, in 1 P. W. 421.* I see no greater inconvenience in this, than where a man charges his lands by will with the payment of his debts, for then all the debts he contracts during his whole life will be a charge.

Suppose a man makes two wills, as is often done, the first charging the real estate with his legacies : by the second will, there are general pecuniary legacies, but is not executed in form, yet I make no doubt, but the latter legacies in the second will would be equally a charge upon the land (1).

The smaller sums given here under the second will, is but a lessening of the quantum of the money given by the former, and is only new modelled or qualified, and equally a charge on the real estate.

But, in the present case, there is no occasion to go so far, because the legacies given by the second will, may be considered as part of the money given by the first, only new modelled or qualified : these are lesser sums, 100 *l.* instead of 400 *l.* and 400 *l.* instead of 800 *l.* if given exactly in the same manner, and to the same persons, there could have been no doubt but there being lesser sums, would have been a revocation *pro tanto*, and undoubtedly a charge upon the land ; but the being given differently, and to different persons, makes the nicety.

However, I am of opinion, this is no more than a lessening of the *quantum* of the money given by the former will, and only differently modified.

By the testator's doubt, indeed, *viz.* I desire this only in case you should make use of the last will : it looks as if he had an intention to leave it in the discretion of the defendant, whether he would make use of the last will or not, tho' it is a little odd this should be his intention, because the one was for, and the other against, the interest of his brother ; therefore, upon the whole, I must decree the raising the lesser sums out of the real estate of the testator.

(1) *Vide Hannis v. Packer, Amb. 556.*

Hine versus Dodd, March 13, 1741.

Case 204:

A bill was brought by a judgment creditor, to be let in upon an estate of one *Proof* and his wife in *Middlesex*, upon to the defendant, who was a mortgagee of the same upon a suggestion that the defendant had notice of the same before the mortgage was executed, and likewise to be let into the consideration of the mortgage.

Burn. Ch. 258. S. C. The plaintiff, a judgment creditor upon an estate in *Middlesex*, prays to be let in upon it preferably to the de-

mortgagee of the same estate, on a suggestion he had notice of the judgment before the mortgage was executed. The judgment was entered on the 12th of March, 1733, but not registered till the 12th of June, 1735; the mortgage was made the 24th of May, 1735, and registered June the 2d, 1735. Only a defendant's confession of notice proved, in direct contradiction to his answer, and contrary to a statute of parliament made to prevent perjury, Lord Hardwicke decreed, so far as the bill seeks to pass upon the mortgage, it should be dismissed with costs.

judgment was entered upon the 12th of March, 1733, registered till the 12th of June, 1735.

mortgage was made the 24th of May, 1735, and registered June the 2d, 1735.

CHANCELLOR,

case depends upon the notice the defendant had of the same before his mortgage was registered.

register act, the 7th of Ann. c. 20. is notice to the parties, notice to every body (1); and the meaning of this statute is to prevent parol proofs of notice, or not notice.

The register act is notice to every body, and the meaning of it was to prevent parol proofs of notice.

notwithstanding there are cases where this court have refused upon this, though one incumbrance was registered before, but it was in cases of fraud: the first was an Irish case in the House of Lords (2), the next was a Yorkshire cause before Chancellor King (3).

It is only in cases of fraud this court have broke in upon the act, tho' one incumbrance was registered before another.

It may possibly have been cases upon notice divested of notice, but then the proof must be extremely clear.

though in the present case there are strong circumstances: before the execution of the mortgage, yet, upon mere notice only, I will not overturn a positive law.

first evidence is *Elizabeth Hine*; but I cannot lay any weight upon her deposition, it is only an account of a conversation at the Devil tavern, where the plaintiff was present with *Burton*, the agent of *Dodd*: the next is *Thomas Price*, who says that the plaintiff told *Burton*, he knew of this judgment before *Dodd's* mortgage, and that defendant *Dodd* did not contradict what the plaintiff said to *Burton*, but then he does not contradict what the plaintiff said.

most material evidence is *Sarah Hine*, who was present with plaintiff *Burton* and *Dodd* on the 18th of June, 1738,

Thompson v. Thompson
1 (Rev. Thane case)

Stacy v. Lutyens
8 Hare. 159

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vide Murrecock v. Dickins, Amb.

(3) *Blades v. Blades*, 1 Eq. Ab. 358. pl. 12. S. C. post. 3 vol. 654. S. C.

Wheeler v. Denison, 1 Ves. 67. S. C. 1653. S. C. 2 Bro. P. C. 425.

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HINE v.
DODD.

at a meeting in order to adjust all matters in difference between them: she swears that the plaintiff then charged *Dodd* with notice of the judgment, prior to the execution of the mortgage; that *Dodd* answered, it was true he knew of the judgment, that he knew, at the same time, it was not registered, and were acts of parliament for, unless they were effectually served.

Undoubtedly this is a material evidence, but then it is only a witness against the answer of the defendant (1): it is true his answer is very loose, by referring from one answer to another; but in the last he swears to his belief, that he did not know of the judgment till after the mortgage was executed.

So that here is barely the evidence of a defendant's confession in contradiction to his answer, and contrary to a positive act of parliament made to prevent any temptation to perjury from contrariety of evidence.

Some stress has been laid upon *Burton's* being an agent of *Do* and likewise the solicitor in the cause of *Hine* and *Proof*; but this suit was two years before *Dodd's* mortgage, it will not affect *Dodd* with notice.

But what weighs principally with me, is the great danger of overturning an act of parliament, and making it mere waste paper.

Clear notice is a proper ground of relief, but suspicion of notice, though a strong one, will not justify the court in breaking in upon an act of parliament.

To be sure apparent fraud, or clear and undoubted notice would be a proper ground of relief (2); but suspicion of notice though a strong suspicion, not sufficient to justify the court breaking in upon an act of parliament.

His Lordship therefore decreed, so far as the plaintiff's bill seeks relief by postponing the defendant *Dodd's* mortgage to the plaintiff's judgment, that it be dismissed without costs.

But being doubtful as to the consideration of the mortgage, referred it to a Master to take an account of what was justly *bona fide* due to the defendant *Dodd*, before and at the time the mortgage was executed.

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But would not direct the inquiry as to the sums of money pretended to be advanced by him after the mortgage, because there was no positive evidence as to sums advanced afterwards, but only hearsay and information from the defendant *Dodd*, that such a one heard him say, and another was informed by him that he paid part of the consideration after the mortgage was executed.

(1) *Watton v. Hobbs*, ante 19.

Le Neve v. Le Neve, post. 3 vol. 6

(2) *Blades v. Blades*, 1 Eq. Ab. 358.
pl. 12. *Cheval v. Nichols*, 1 Stra. 604.

Sheldon v. Cox, Amb. 624. *Cox v. 7*

Car versus Car, upon an appeal from the Rolls, March 17, 1741. Case 205.

THE bill was brought by *John Car* a child, advanced with 200 *l.* by his father in his life-time, who was a freeman of *London*, to be let into his share of the customary part, upon bringing the money so advanced into hotchpot; and that *Charles Car*, another child of the freeman's, might not be let into the customary share without bringing his 200 *l.* likewise into hotchpot.

A father, a freeman of *London*, who had left a son a legacy of 200 *l.* on his application two years after the will was made, gave him 100 *l.* and took a re-

ceipt for so much in part of a legacy, and a short time after the father gave him the other 100 *l.* and took a receipt from him in full of what was intended him by the will. The testator died without altering his will. *Lord Hardwicke* held the 200 *l.* must be considered as an advancement, and brought into hotchpot.

Charles Car, who is the principal defendant in this cause makes this case, that he had a legacy of 200 *l.* left him by his father's will, and the residue of the testamentary part being given to his sister and another person (1), that he ought to have the preference in the testamentary part, and the residuary legatees take subject to his legacy.

It appeared in evidence that *Charles Car*, two years after the will was made, came to the testator, and said it would be of advantage to him to have it in the life-time of his father, upon which he gave him 100 *l.* and took a receipt for 100 *l.* in part of a legacy intended him by the will, and a short time after gave him the other 100 *l.* and took another receipt from him in full of what was intended him by the will.

The testator died without making any alteration at all in his will.

The plaintiff's counsel insist that it must be taken as an advancement of *Charles*, and cannot be a legacy, for nothing can be a legacy which is given in the life-time, because the will is intirely under the controul of the testator, who might have laid his money out in land, or revoked the legacy, and therefore must be considered as an advancement, and brought into hotchpot.

Mr. Murray for the defendant insisted, that it cannot be looked upon as the payment of the legacy, but only accelerated in the life-time of the father; and notwithstanding he received it in the life-time, is yet intitled to 200 *l.* from the dead man's share, and the rest of the freeman's children have no right to interfere, because they have nothing to do but with the customary share.

This is a dispute started chiefly by the residuary legatees of the dead man's share. [278]

But insisted either that it shall not be considered as an advancement, and then *Charles Car* is intitled to the legacy; or if it is an ademption of the legacy as to the dead man's part, that then he shall come in upon the customary share, without bringing the 200 *l.* into hotchpot.

(1) The residue was given to *Charles Car* and his sister.

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CAR.

LORD CHANCELLOR,

Here was 200 *l.* given to *Charles Car* under his father's will if it stood upon that foot, it is undoubtedly a legacy; but two years after the will was made, upon the son's solicitations, the father at two different payments gives him the 200 *l.* and take receipts.

The consequence of this is, that it would have been a satisfaction of the legacy in the case of a common person (1), but the testator being a freeman of *London*, and having no wife, one moiety belongs to the children, and the other moiety is the dead man's part; so that if *Charles Car* had not taken the 200 *l.* in the life time of the freeman, he would have been infallibly intitled to the legacy out of the dead man's part.

But it has been insisted on by the other children, that this is an advancement, and that if *Charles* will claim any share of the customary part, he must bring the 200 *l.* into hotchpot.

It is an established rule, that the legatee cannot take his legacy, and claim his customary part too, unless the testator mentions the legacy shall come out of his

Supposing *Charles's* legacy had not been released, where freeman of *London* gives a legacy generally to a child, the legatee cannot take the legacy, and claim his customary part too, unless the testator expressly mentions, that the legacy shall come out of his testamentary share; and this is the established rule of the court (2).

I am of opinion *Charles's* 200 *l.* must be brought into hotchpot (3), for it would be a most mischievous thing, and a fraud upon the custom, if it was otherwise: for then a freeman might give a great sum of money to one child by his will, and afterwards take a receipt for it as a legacy; and if I was only to consider it as a legacy released out of the dead man's part, and therefore not to be brought into hotchpot, this would be an indirect method contrived by a freeman to lessen his customary share in favour of one child, to the detriment of the rest.

So, for this reason, I think if a freeman gives a gross sum to a child, whether by way of advancement, or upon a child's releasing a legacy intended under his will in the freeman's life-time that money must be considered as an advancement, and brought into hotchpot.

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The residuary legatees of the dead man's part, who are the sister of *Charles Car*, and another person, insist the 200 *l.* received by *Charles* in the freeman's life-time, ought to be taken as satisfaction of the legacy: but notwithstanding this court is compelled by the custom to say this is a gross sum, and an advancement, and that *Charles* must bring the money into hotchpot upon the customary share, yet it is insisted there is an equity for

(1) *Biggleston v. Grubb*, ante 48. note 1.

(2) So *Frederick v. Frederick*, 1 *P. W.* 722. *Contra Babington v. Greenwood*, 1 *P. W.* 533.

(3) His Lordship declared, that the payment of the 200 *l.* was an ademption

of the legacy, and the same ought to be considered as an advancement, and ought to be brought into hotchpot. *Reg. Lib. A.* 1741. fol. 683.

Charles to have so much out of the surplus of the dead man's share, before it is divided between the residuary legatees, as he may suffer by bringing his 200*l.* into hotchpot upon the customary share.

CAR V.
CAR.

But I do not know whether it would not be better for this court to determine, that the defendant *Charles Car* should bring his two hundred pounds at all events into hotchpot, and take his fate there, whether he shall get any thing or not by so doing, without allowing him the liberty of coming upon the dead man's share to the prejudice of the residuary legatees, for so much as he shall suffer by bringing the two hundred pounds into hotchpot.

But his Lordship reserved the consideration, whether the defendant *Charles* is intitled to any, and what compensation out of the surplus of the dead man's part, for so much as he shall suffer by bringing the two hundred pounds into hotchpot, till it comes back upon the Master's report (1), because it was said by counsel, it is doubtful whether there will be any surplus after the legacies charged upon the dead man's part are paid, it being apprehended they will exhaust the whole.

(1) *Reg. Lib. A.* 1741. fol. 683.

Baskerville versus *Baskerville*, March 19, 1741, upon exceptions. Case 206.

ON the first of April 1699, by articles on the marriage of *Richard Baskerville*, *Richard's* father covenants to settle lands upon him, on payment of 3000*l.* the portion of *Richard's* wife. *Though there were no trustees in a will to preserve contingent remainders, Lord Hardwicke ordered that such trustees should be inserted in the conveyances to be settled by the Master.*

On the 10th of January, 1717, *Thomas* the father made his will, and reciting that the 3000*l.* had never been paid him, bequeathed the same to his sons, *John* and *George Baskerville*, and directed the 3000*l.* to be laid out in lands lying in *Wiltshire* and *Herefordshire*, to be conveyed to them the said *John* and *George* for 40 years, subject to the payment of two annuities, and after the expiration of the said term, to the use of *Walter Baskerville* his grandson for life, and his first and other sons in tail male, afterwards to another grandson with like limitations, and so to a third grandson, &c. then to his the testator's three sons successively for life, and their respective first and every other sons in tail male, and afterwards to the issue male of his own body, and in default thereof to his own right heirs.

There were no trustees in the will named to preserve contingent remainders. [280]

By an order of this court the 3000*l.* was directed to be paid by *Richard Baskerville*, and to be laid out in the purchase of lands to be settled to the uses in the said will.

A purchase has been agreed for accordingly of an estate, and by order all parties were to join in a conveyance to such trustees and

CASES Argued and Determined

and their heirs as Master Holford should approve of, upon the several trusts and uses as are mentioned in Thomas Baskerville's will.

The solicitor for Thomas Baskerville the son of Richard, who takes the exception, and also is intitled to the reversion of the estate to be purchased after all the estates-tail are spent, attended before the Master, and made no objection to his report, and the Master approved of the deeds without naming trustees to preserve contingent remainders, and the conveyances were executed by the parties accordingly.

But on the 12th of February, 1741, Thomas Baskerville the reversioner, grandson and heir of Thomas Baskerville, the testator, obtained an order, that he should be at liberty to file an execution to the Master's report of his approbation of the deeds of conveyance.

The exception was as follows; for that the Master hath approved of a conveyance of the several lands, whereby they are settled and limited to the several devisees under the will, in order as they stand there for life, with remainder to the first and every other sons in tail male, and yet in the conveyance they are not trustees to support contingent remainders, inserted, between the several limitations of the first and every other sons of each tenant for life, which ought to have been done.

LORD CHANCELLOR,

This is an executory trust to be carried into execution in the court (1).

The question is, whether the settlement ought to be made immediately to the sons, or whether the trustees should be inserted in order to preserve contingent remainders.

I am of opinion the trustees ought to be inserted.

The first objection is, that by the decree the money directed to be laid out in land, it is no longer executory.

But these are only words of reference to the will, and the decree must be expounded accordingly. *Vide Lord Stamford Lord Hobart*, which is in point, cited in *Cas. in Ch. in L. bot's time*, 8. as a case concerning serjeant Maynard's will.

The material question is upon the construction of the will and the intention of the testator, whether there is any authority.

There have been several cases before the court, within the last century, of this sort have been made, but different from reasoning of them. *Legate versus Scwell*, 1 P. W. M. versus *Coleman*, 1 P. W. M. 142. But the question was not whether there should be trustees and *Scwell* was not what estate the first taker of the remainders, but what estate the first taker of the Lord *Cropper* considered it in the same light as if it had been marriage articles; but in the case of *Bale* versus Lord *Harcourt*, he said marriage articles and a

(1) *Vide Stamford v. Hobart*, 1 Bro. 471. *Glenorchy v. Boyd*.
Leonard v. Earl of Suffolk, 9 Alb. 3. *Roberts v. Dill*.
Allen v. Voice, 2 P. W. 607. *Bazshaw v. Spence*.

ferent; for a will proceeds merely from the bounty of the testator, but marriage articles are a matter of contract and agreement; not that my Lord *Harcourt* was of opinion (as has been often said at the bar) that the conveyance was to be made in the words of the will, but according to the legal operation of it only, for otherwise it would introduce great absurdity, as words in a will and in a conveyance have different constructions, as for instance the word *issue*.

The testator has only given the first devisee an estate for life, and therefore the court do not deprive him of any estate, but only take the power from him of doing a wrong; for if a son is born the remainder is gone, and it becomes a vested one. But I shall not go so far as my Lord *Cowper* has done in the case of serjeant *Maynard's* will, for he went upon this, that there was a manifest and apparent intention, that a strict settlement should be made: I shall adhere to the rules of conveyancing which have been laid down by the great men before the restoration, and during the usurpation.

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v.
BASKERVILLE.

Lord Hardwicke said, in the directions he gave in this case, that he adhered to the rules of conveyancing laid down by the great men, before the restoration, and during the usurpation.

Here it is a bequest of a sum of money to be laid out in land, and therefore merely executory; and the question is whether the court shall carry it into execution so as to make it nugatory and of no effect, or so as to answer the clear intent of the testator, which was to have a strict settlement; for could it be imagined that this man would have taken all these pains to chalk out so many limitations to no less than six different branches of the family, and intend it should be in the power of the first taker to destroy them?

The exception was allowed, and the Master ordered to rectify the conveyance, by inserting trustees to preserve the contingent remainders.

Dormer versus Fortescue, March 20, 1741-2.

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Case 207.

IN *Easter* term 1732, the plaintiff brought his bill for discovery of a deed under which he claimed, and that the same might be deposited for safe custody, and produced at a trial at law, and for general relief, on hearing the deed was ordered to be produced, and the bill retained for a twelvemonth, and from time to time retained, and still depending: in *Michaelmas* term 1731, the plaintiff brought ejectments, but could not proceed for want of the deed, which was then concealed by the defendant; a trial was had at the King's Bench bar, and a special verdict, and judgment for the defendant, for that it did not appear that the plaintiff had made an actual entry on the premises before the day laid in the declaration: on the 10th of *November*, 1735, the plaintiff made an actual entry, and in *Michaelmas* term afterwards brought new ejectments; a trial was had at the King's Bench bar in *Michaelmas* term 1738, and a special verdict. Judgment for the plaintiff in *Michaelmas* term 1740, and affirmed in parliament *February* 28, 1740. *Euseby Dormer*, the plaintiff's father, did *September* the 3d, 1729, and the defendants were in possession

S. C. post. 3 vol. 124.
Whoever comes here for an account of rents and profits, prays a discovery as incident to it, and for that reason a defendant cannot demur and plead to the same matter.

Monyman
Bristow
2 Russ. & M.
Bickley & Co.
Russ. & M. 1

DORMER V.
FORTESCUE.

sign. Hannan
2d Feb. 1720.

in v. Thomas
by Holbyer
538.

all the time, and therefore the plaintiff insists they ought to account for the rents and profits from that time, or from the plaintiff's first actual entry, which was in *January 1731*, or at least from the filing the original bill for discovering the deed of settlement, and the prayer of the supplemental bill, filed *May 26, 1741* is to this purpose.

To this the defendant has both demurred and pleaded.

As to so much of the bill as seeks to compel the defendant to come to an account with the plaintiff for all the rents and profits of the estate received by the defendant since the death of the plaintiff's father, the defendant demurs, and for cause of demurrer shews, that if the plaintiff has any right or title to rents or profits, he ought to prosecute the same at law, and not in this court.

And as to so much of the bill as seeks to compel the defendants to come to an account, &c. the defendants plead in bar and for plea say, that if the plaintiff has any right, &c. the same accrued due to the plaintiff above six years before he exhibited his supplemental bill.

Mr. *Attorney General* for the defendant insisted, that there was no occasion for the plaintiff to come into this court for mesne profits, because he might recover them at law in an action of trespass, if over-ruled in this point;—then he insisted on the statute of limitations as a bar, and that the plaintiff ought to be confined to the time his supplemental bill was filed, which only prays the mesne profits, for the original bill makes no such demand, and therefore the statute of limitations ought to be a bar to carrying it any further back.

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That bills for mesne profits are not very usual in this court and the single pretence in this case is, that they had not the settlement, and therefore they could not recover at law: but it was not the want of the settlement, it was the slip they made in making a proper entry, which prevented their recovery at law and therefore the court will not aid a defect of the plaintiff's, nor give him relief here, because his own blunder hindered him from recovering at law.

That it is not a favourable case, after so much litigation below and in the House of Lords.

The original bill was merely for the discovery of a deed, without which the plaintiff could not make out his title; he has lost the relief he sought for; the court ordered the deed should be delivered to be carried down to the trial in ejectment, and therefore there is no connection between the relief prayed by the former bill, and the relief prayed by the supplemental bill.

LORD CHANCELLOR,

This is an exceeding plain case; the circumstances of hardship will be a consideration hereafter at the hearing of the cause the only question now is, whether the two defences set up are sufficient to bar the plaintiff's relief.

The demurrer is to so much of the bill as seeks an account from the death of the plaintiff's father, so that it takes in the whole time.

The plea is to so much as seeks an account of rents and profits before the filing of the supplemental bill.

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FORTESCUE.

So that the difference between the matter demurred to, and the matter pleaded to, is no more than this; the demurrer takes in the whole time, and consequently the time precedent to the six years, the plea only a part of the time, *viz.* before the filing the supplemental bill; which brings it to this question, whether a man can in this court demur and plead to the same matter.

Every man who comes here for an account of rents and profits, prays a discovery as incident to it, and therefore the distinction which has been attempted is without a difference, and for this reason I am of opinion a defendant cannot demur and plead to the same matter.

There is no such thing ever known at law as pleading and demurring to the same matter, and the act of parliament for the amendment of the law does not allow of this, but only to demur to one matter, and to plead to another; the same rule in this court, and the inconvenience much less here than at law, for a man who demurs there demurs in chief; and is a perpetual bar if judgment should be against him, and therefore it is at his own peril if he does it; but if a defendant demurs here, and is over-ruled, he may insist afterwards upon the same thing by his answer.

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A man who demurs at law demurs in chief, and 'tis a perpetual bar if judgment should be against him; but if a demurrer is over-ruled here, a defendant may insist afterwards upon the same thing by his answer.

Where there is a plea which covers too much, the court will allow it to stand for part, and over-rule it for part, but as to a demurrer it is otherwise (1).

A plea may stand for part and over-ruled for part, otherwise as to a demurrer.

As to the merits, I am of opinion that the plaintiff was very well justified in coming here for an account of the mesne profits, notwithstanding the suggestion of hardship upon a defendant, who lives upon them in the mean time; there are cases where a man may come here though he has recovered in an ejectment. The original of the plaintiff's applying to this court was, for a discovery of the principal deed of settlement.

But then it has been said, the plaintiff knew what his title was, and might have brought his ejectment without coming etc.

Is a plaintiff obliged to run any risk because he may possibly cover at law, without applying to this court first? But there is much stronger part of the plaintiff's case, and that is he had title at law, because here was a term standing out of ninety-nine years under this deed of settlement, which might have been set up against him, and then he would have been nonsuited, even if he had had the settlement itself, unless this court had prevented any advantage being taken of the term at law.

I am of opinion that the court, even upon the reserving all other directions, might have given any subsequent relief which had been incident to the plaintiff's case.

(1) *S. v. Green*, ante 1 vol. 451. note.

Another

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FORTESCUE.

Another thing which weighs materially with me is, that if the plaintiff should bring any action of trespass for the mesne profits, Judges have been doubtful, where there has been any difficulty in a case, whether they should not suffer defendants to enter into the title, and if that should happen to be the case, the term in the settlement might even then be set up against the plaintiff, and he would be non-suited.

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As to the plea of the statute of limitations, every thing I have said upon the footing of the demurrer, holds more strongly against the plea.

Upon the whole, I am of opinion, the plea and demurrer must be over-ruled.

As to all equitable circumstances, and how far the account must be carried back, will come more properly before me at the hearing of the cause, and there is no occasion to consider them at present*.

* Vide *post*.
3 vol. 124.

Case 208.

Wills versus Rich, Petitions, March 29, 1742.

An executor,
before probate,
may so far act,
as to get in and
receive his test-
ator's estate, or
release debts,
or even bring
actions for them.

THE plaintiff Mr. *Wills* petitioned, that he might continue in possession of the houses late Sir *Charles Willis's* in *Grosvenor-square* notwithstanding a receiver, in pursuance of an order of this court, has been approved of by the Master, to take care of the personal estate of Sir *Charles Willis*, while the will is controverting in the Commons.

The principal argument for the petitioner was his being next of kin, and that as Sir *Robert Rich* has obtained no probate of the will, that though he is executor, he can have no manner of right.

It was insisted on the other side, that though the houses are chattels real, yet they are equally included in the order for a receiver upon the personal estate, with any other part; and that as Sir *Robert Rich*, in pursuance of this order, has paid in the bank bills, the houses ought also to be delivered up by the petitioner, especially as he forcibly came into the possession of them, by turning out Sir *Robert Rich*, who, from the death of Sir *Charles Willis*, till that time, had the quiet enjoyment of the houses.

LORD CHANCELLOR,

If the dispute was only who had a right to these houses, it might perhaps be just for me to order the possession to be delivered up to Sir *Robert Rich*, who had it originally, at the death of Sir *Charles Willis*.

For, notwithstanding a will is not proved, the executor, in the eye of the law, is considered as having some authority; for even before probate, he may so far act, as to get in and receive his testator's estate (1), or release debts (2), or even bring ac-

(1) *Went. Off. Ex.* 34. *Vide Phipps v. Steward*, ante 1 vol. 235.

(2) *Middleton's case*, 5 Co. 28. a. 9 Co. 39. a. *Pharad.* 281. Co. Litt. 292. b. ante 1 vol. 461.

for them, though *at the trial*, indeed, the law will oblige to produce the probate (1), so that an heir at law, or next of kin, is very far from being justifiable in forcibly turning out an executor.

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; however, as the executor Sir Robert Rich has applied to court, I shall make it the condition of my order, upon the order, to deliver up possession that he shall do it, provided proceedings at law upon the indictment for a forcible entry did.

both parties in this case had not brought their bills, and stated the matters in dispute to chancery, I should have been bound to have left the whole to the discretion of the spiritual court, who in cases of controverted wills, appoint an administrator *pendente lite*, to take care of the estate.

The Spiritual court, in cases of controverted wills, appoint an administrator, *pendente lite*, to take care of the estate.

were a person, let him be heir at law, or next of kin, or other man whatever, keeps possession of the testator's real or old estate, such an administrator is intitled to bring ejectment for the recovery of the possession; indeed, this did admit doubt in courts of law for a considerable time, but is now settled, ever since the case of *Walker versus Wallaston*, in *art of King's Bench*, 2 P. Wms. 576.

Where a person, whether he is an heir at law or next of kin, or any other man whatsoever, keeps possession of the testator's real or personal estate, such an administrator is intitled to bring ejectments for the recovery of the possession.

administrator is intitled to bring ejectments for the recovery of the possession.

the petitioner was allowed a month to provide himself with a bill, before he quits the possession (2).

1 *Roll. Ab.* 917. *A.* 2. *Duncomb v.* (2) Possession decreed to be delivered to the receiver. *Reg. Lib. B.* 1741. fol. 232. *b.* ante 1 vol. 461. *Mitchell* 263. *art.* post. 3 vol. 607.

Newsham versus Gray, April 2, 1742.

Case 296.

THE plaintiff had obtained letters patent of the crown for a new invention of fire engines.

Where the court did not think the answer full enough, and

made an issue upon the merits, this is not hearing a cause upon bill and answer only, but a subsequent trial, and therefore out of the rule or dismission with forty shillings costs.

the bill was brought by him to establish his letters patent, and perpetual injunction against the defendant, who had taken him to make and vend these engines, notwithstanding the plaintiff had the sole right and property under the letters patent.

the defendant, by his answer, insisted it was not a new invention, so as to intitle the plaintiff to an injunction.

there was no replication, but the cause came on at the Rolls, on bill and answer, in September 1740, before Mr. Justice Wilmot, who, not thinking the answer sufficient, directed an issue at law to be brought by the plaintiff, for a breach of the letters patent, and retained the bill for a twelvemonth; the plaintiff

NEWSHAM v. GRAY. plaintiff was nonsuited at law upon the merits; and the cause is now set down by the defendant for a dismissal of the bill, and for costs.

LORD CHANCELLOR,

The only question is, as this is a cause upon bill and answer, Whether the court is bound to dismiss it only with forty shillings costs?

It is true, this is the general rule of the court, but, in this case, I am of opinion it ought to be dismissed with costs, to be taxed by a Master.

The present case differs from all those where forty shillings costs are given; for this did not properly come upon bill and answer only, because here the court did not think the answer full enough, and therefore directed an issue upon the merits; and therefore I do not hear the cause upon bill and answer only, but upon the verdict, which is a subsequent proceeding beyond the bill and answer, and this is a plain distinction out of the common rule.

I gave directions to the register to search for cases in point, but they have not found any as yet; however there are several that are analogous and similar to this, if not exactly the same (1).

Where a cause is referred to a Master to take an account, the court looks on the reference as a subsequent proceeding beyond the bill and answer, and will dismiss the bill with costs to be taxed.

Where principal and interest on a bond is not paid on the day fixed by the Master, or the defendant's setting down the cause again, the bill will be dismissed with costs to be taxed.

As, suppose a bill was brought to redeem a mortgage, where the defendant, the mortgagee, submits by his answer to be redeemed, and the cause is heard upon bill and answer, and referred to a Master to take an account of what is due for principal, interest, and costs, and to appoint a day to redeem; if the mortgagor does not redeem on the day, the court will dismiss the bill with costs, to be taxed by a Master, considering the reference as a subsequent proceeding beyond the bill and answer.

So likewise, on a bill brought to be relieved against the penalty of a bond, where the principal money lent, and interest is not paid on the day fixed by the Master, on the cause being set down again by the defendant, the bill will be dismissed, with costs to be taxed by a Master.

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Where a plaintiff, merely to keep his cause alive, replies, and afterwards withdraws his replication, and sets it down on bill and answer

only, that it may be dismissed with forty shillings costs, this is evading the justice of the court, for otherwise he must have paid the full costs.

Before 4 Ann. c. 16. sect. 23. for the amendment of the law, this court, upon motion, used to dismiss bills for want of prosecution, with twenty shillings costs; but the act has provided, upon the plaintiff's dismissing his own bill, or the defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant his full costs, to be taxed by a Master.

(1) Vide *Sutton v. Stone*, ante 101.

But, since the act, another inconvenience has arisen, which should make the court incline as much as they can, consistently with their own rules and justice, for dismissing bills of this sort, with costs to be taxed; and that is, a man's bringing a bill upon a frivolous account, who, in order to keep his cause alive, replies, and afterwards moves to withdraw his replication, and that he may be at liberty to amend his bill, and if the motion is granted, he then sets it down upon bill and answer only, that it may be dismissed upon forty shillings costs, which is evading the justice of the court; for otherwise, if he had not withdrawn his replication, he would have paid the full costs.

Therefore his Lordship seemed inclinable to alter the course of the court with regard to forty shillings costs only, in cases of dismissal upon a bill and answer, as it is a hardship upon the defendants to be put to great expences, with motions and other interlocutory proceedings, and yet not to be allowed any more than forty shillings costs (1).

(1) Bill dismissed with costs to be *fol. 190. Johnson v. Brown, 102. 3 vol. 1.* taxed by the Master. *Reg. Lib. B. 1741. Mansell v. Bowles, 1 Bro. Cha. Rep. 403.*

Easter Term, April 27, 1748.

Case 210.

LORD CHANCELLOR altered this day the course of the court, in regard to dismissing bills, where the cause is set down upon bill and answer only, or where it is so set down after withdrawing a replication, and ordered, that, for the future, it should be left to the discretion of the court, according to the merits of the case, to dismiss the bill with forty shillings costs, or costs to be taxed by a Master, or with no costs; an order was drawn for this purpose, was ordered to be read in court, and his Lordship directed it afterwards to be fixed in the Register's office.

to be taxed, or with no costs; and an order for this purpose directed to be fixed in the Register's office.

April 27, 1748.

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Ido Curia.

THE Right Honourable the Lord High Chancellor of Great Britain, taking into consideration the present course of this court in relation to costs to be ordered upon dismissions of bills, in causes brought to a hearing upon bill and answer, which costs are only forty shillings, whereby the plaintiffs are frequently encouraged to bring frivolous and vexatious bills, and to set such causes down for hearing, to prevent the same being dismissed with costs for want of prosecution (in which case the defendant would be intitled to his full costs, to be taxed by a Master) by means whereof much unnecessary trouble is given to the court in hearing such causes, and defendants are frequently put

put to a very great expence, for which (according to the present course of the court) they receive no other satisfaction than such forty shillings costs.

His Lordship therefore, to discourage such practice, doth declare and adjudge, that, for the future, the said course or practice shall be varied and altered; and that where any cause shall be brought to a hearing upon bill and answer, and such bill shall be dismissed, this court may and is at liberty to direct and order such dismissal to be either with forty shillings costs, or with costs to be taxed by a Master, or without costs, as the court, upon the nature and merits of the case shall think fit: And, that all persons concerned may take notice hereof, it is ordered, that this order be entered with the Register, and copies thereof set up and affixed in the publick office of the Six Clerks, and Register of this court.

As well on commissions to take answer and pleas in the country, as before the Masters, commissioners shall see the defendants sign their answers or pleas for the future.

The same day his Lordship made another rule for regulating the practice of the court; that as well upon commissions to take answers and pleas in the country, as before the Masters, commissioners shall see that defendants sign their answers or pleas for the future, because, as it has been most usual hitherto for commissioners to return the answers and pleas without being signed by the parties, an inconvenience might arise from it, as it would be difficult to frame an indictment against them, if they should be guilty of perjury in their answers.

The following order drawn up for this purpose was read in court.

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April 27, 1748.

Ordo Curie.

THE Right Honourable the Lord High Chancellor of Great Britain taking notice, that answers and pleas taken by commission in the country, are frequently returned without being signed by the defendants, swearing such answers or pleas, by means whereof it may be very difficult to convict any defendant of perjury, who shall have been guilty thereof in such answer or plea; and that it is now the constant practice for defendants, who swear their answers or pleas before a Master of this court, to sign the same at the time of taking such answers or pleas: his Lordship doth therefore order, that from and after the first day of *Trinity* term next, all answers and pleas, as well those which shall be taken by commission, as those which shall be taken before any master of this court, be signed by the parties swearing such answers or pleas in the presence of the Master, or of the commissioners before whom the same shall be taken respectively; and that all parties concerned may take notice hereof, and act accordingly, it is further ordered, that this order be entered with the register, and copies thereof set up and affixed in the publick offices of the six clerks and register of this court,

Plunket versus Penfon, a cause by consent, April 3, 1742.

Cafe 211.

MR. *Penfon*, the testator, who was the *cestuique trust* of a real estate, made a mortgage of it in fee (1), and the equity of redemption being in him, he, by his will, gave and devised to his dear son and to his heirs for ever the mortgaged remises, subject nevertheless to the payment of his debts, annuities and legacies, and died indebted by bond and simple contract.

S. C. ante 51. Semb.
P. a *cestuique trust* of a real estate, made a mortgage upon it in fee, and devises the equity of redemption to his son and his

heirs, subject to the payment of his debts, and died indebted by bond and simple contract; as this was a mortgage of the whole inheritance, and nothing remaining in the mortgagor, the bond-creditor can have no preference, but must be paid *pari passu* with other creditors.

The question in this case was, if the assets of the testator are equal or equitable; and whether the simple contract creditors are to come in *pari passu* with the bond-creditor, who is the plaintiff; or whether he shall be paid first in a course of administration.

Mr. Cox, who was counsel for the bond-creditor, insisted, that the assets of the testator must be considered as legal; because, notwithstanding the devise to the heir, it is exactly the same as if the lands descended to him with a charge, and therefore the simple contract creditors ought not to come in *pari passu*.

He cited the case of Lord *Mussam* versus *Harding* (2), in the *Court of Exchequer*, 1734, where an equity of redemption was held to be legal assets; but I must be so candid as to own, that Lord Chief Baron *Comyns* took this distinction, that if it was a mortgage for years, then it would be legal assets, because the whole interest was not gone from the mortgagor, the reversion in fee being left in him; otherwise where it is a mortgage in fee; and before Mr. *Verney* at the *Rolls*, the case of *Spencer* versus *Biffin*, in *Mick. term*, 1734 (3), was determined upon the authority of *Mussam* and *Harding*; he cited also *Fremoult* versus *Dedire*, et c. con. 1 P. W. 430. in which Lord *Macclesfield* held, where one devises his lands for payment of his debts, bonds and simple contract debts shall be paid equally; but if he only charges his lands with the payment of his debts, so that the land descends subject to the debts, the bonds shall be preferred before the simple contract debts.

Mr. Attorney General, for the simple contract creditors, insisted, that a devise to an heir, of an estate charged with debts, is exactly the same thing as devising it in trust to him for the payment of his debts, and then they are equitable assets, and all creditors are intitled to come in *pari passu*.

The bond-creditor in this case cannot recover at law, because the testator, who was the obligor, had not the legal estate, it be-

May 10 & 11 P.

H. Hill

15 Nov. 1742.

Spencer v. Biffin

5 Nov. 1734.

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(1) In this mortgage one Benjamin Young joined, who seems to have been the trustee. But in the decree Lord Hardwicke directed the Master to enquire

whether Benjamin Young, an infant, was a trustee within the stat. 7 Anne.

(2) *Bomb.* 359. S. C.

(3) *Vide* 3 Cox's P. W. 344. note 3.

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PINSON.

ing a trust estate, and in mortgage, and therefore was obliged to come into this court for a satisfaction.

Mr. *Moreton*, on the same side, cited the case of *Kent versus Craigs*, between the seals after Michaelmas term, 1741; the question there arose upon the will of Mr. *Wrottesley*, who bequeathed, after his lawful debts are paid, and funeral expences are defrayed, all he is now in possession of, or any wise intitled to, to his aunt Mrs. *Craigs*, and made her executrix, and yet held by Lord *Hardwicke* that they are equitable and not legal assets, and that creditors must come in *pari passu*.

LORD CHANCELLOR,

If, in the case of Lord *Maffam* versus *Harding*, it was a mortgage in fee, the bond-creditor could not come at it, as the obligor had not the legal estate; for I think my Lord Chief Baron *Comyns*'s distinction was right in that case, between a chattel mortgage and a mortgage in fee.

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No instance where an equity of redemption has been held to be liable to the execution of a bond-creditor, in the life of the mortgagor.

I should be glad to be informed, whether, there is any instance, where an equity of redemption has ever been held to be liable to the execution of a bond-creditor in the life of the mortgagor (1); to which the counsel in this case made answer, they could not recollect any instance where it had been so held.

The particular question here is, whether the creditors shall come in *pari passu*, or whether a bond-creditor is intitled to the preference.

The testator was never intitled any otherwise than as *cestui que trust* of a real estate, which he mortgaged, and having consequently the equity of redemption of a trust-estate, makes his will, and devises to, &c. (*Vide the will as before stated*) then dies indebted by bond and simple contract.

The first question, supposing the testator had been seised of a legal estate, is, whether, by force of the will, this is not out of the statute of fraudulent devises, 3 & 4 Will. & Mar. chap. 14; this depends clearly upon the construction of that statute. By this act "all wills, dispositions or appointments of lands or tenements, &c. whereof any persons, at the time of their decease, shall be seised in fee-simple in possession, reversion or remainder, or have power to dispose of the same by their last wills, shall be deemed and taken (only as against creditors by bond or specialty binding the heir) to be fraudulent and void; and every such creditor shall have his action of debt upon his and their bonds and specialties, against the heir at law of such obligors and such devisees jointly."

Now before the making of this act of parliament, at common law a bond-creditor, where the land was devised, had no remedy against the devisee, and therefore this statute has taken care that such a devisee shall not prevent the remedy.

Then comes *the proviso*: "Provided always, that where there hath been or shall be any limitation or disposition of lands or

(1) *Vide Lytler v. Dolland*, 3 Bro. Cha. Rep. 478. Ves. jun. 431. S. C.

"anomalous"

ements for the raising or payment of just debts or portions children, other than the heir at law, in pursuance of any riage-contract or agreement in writing, *bona fide* made before marriage, the same and every of them shall be in full effect (1)."

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consequence of *this proviso* is, that it operates by way of lien upon such devises as are for payment of debts; for use does not give any new force to the law in this particular; but leaves it just as it stood before the making of the

question will be then, Whether the devise here has broke descent; if it has, then, in point of law, all consequences follow by Mr. *Attorney General* will follow: for the bond-creditor is deprived of his remedy at law, and forced to come to court: but if it has not broke the descent, then this law has no right to take from a specialty-creditor his remedy at

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the present advised I do conceive it does not break the descent and for this purpose *vide Clark versus Smith*, 1 Salk. 241. Chief Justice *Treby's* time, where the court held that, if the estate is devised to H. which he would have taken by descent, he is in by descent, notwithstanding the possibility of a devise; if so, I do not know that a court of equity has ever away from a bond-creditor his right which he has at law. The case of *Freemoult versus Dedire* comes very near to it.

If the same estate is devised to H. which he would have taken by descent, he is in by descent.

The fifth section of the statute of fraudulent devises, which relates to the heirs at law aliening the land descended in order to the payment of just debts before action brought against him, enacted, "that such heir shall be answerable for such debts to the value of the land so aliened, &c. in which cases all creditors shall be preferred as in actions against executors or administrators, and such executions shall be taken out upon any judgment so obtained against such heir to the value of the same as if the same were his own proper debt:" but as to that the first proviso, which takes notice of a devise for raising debts, it is so darkly penned that I do not well understand the meaning of it.

In this case differs from *Kent versus Craig*, cited by Mr. *Attorney General*, for there the testator first charged his lands with the payment of his debts, and then devised the estate so charged to a stranger, so that being a devise to a stranger, the devise broke, and there was no remedy but from the statute; consequently there was a ground for making it equitable assent in *Freemoult versus Dedire* the descent was not broke: in *Kent versus Craig* the whole rested upon the statute, for not the devise, but an appointment for payment of debts, are enu-

A devise of an estate charged with the payment of debts to a collateral relation, being a devise to a stranger, the descent is broke, and it is equitable assent.

With respect to the construction of the clause, *vide Earl of Bath v. Earl of Arundel*, 2 Ves. 590. *Lingard v. Ford*, 1 Bro. Cha. Rep. 311. 139. *Derby v. Doubden*, 2 Bro. Cha. Rep. 614. (2) *Contra Hargrave v. Findal*, 1 Bro. Cha. Rep. 136. in note 136. *Barson v. Lindegreen*, 2 Bro. Cha. Rep. 94. See *Blatch v. Wilder*, ante 1 vol. 420. note.

II.

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PLUCKNET v. PENSON. merated in the enacting clause: here the descent is not barred and the creditor may have his remedy at law supposing the debtor to have been seised of the legal estate.

But the second question will be, Whether an equity of redemption of a mortgage in fee of a trust-estate ought to be considered as legal or equitable assets (1).

Where a mere trust estate descends upon an heir at law, it will be considered as legal, and not as equitable assets.

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A reversion in fee being in the mortgagor on a mortgage for years, it is legal assets, because the bond-creditor may have a judgment against the heir of the obligor, and a *cesset executio* till the reversion comes into possession.

I do agree that if a mere trust-estate descends upon an heir at law, that it will be considered as legal, and not as equitable assets; and this is founded upon the third clause of the statute which gives a specialty-creditor his remedy at law by an action of debt against the heir of the obligor, but it has not more a mortgage in fee of a trust-estate subject to the same thing.

If there is a mortgage for a thousand years, and the reversion in fee left in the mortgagor, it will be legal assets (2), because the bond-creditor might have judgment against the heir of the mortgagor, and a *cesset executio* till the reversion come into possession; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond-creditor can have to make it assets at law; and if the specialty-creditor should bring an action against the heir, he may plead *riens per descent*.

Where a plaintiff, a specialty creditor, must come here for relief, the court will do equal justice to all creditors, without any distinction as to priority.

Therefore if the plaintiff is under a necessity of coming for relief, this court will act according to its known rule of equal justice to all creditors, without any distinction as to priority.

“ His Lordship declared the will of *Thomas Penson* ought to be established, and the trusts thereof performed; and directed the same accordingly; and directed an account of his personal estate, and to be applied in payment of his debts, in a manner of administration; and if that should not be sufficient, then an account to be taken of the rents and profits of the testator's real estate, and to be applied in payment of the testator's debts, not satisfied out of his personal estate, *pari passu*. And in case the personal estate, and rents and profits of the testator's estate of the testator, shall not be sufficient to pay his debts, it was ordered, with the consent of the mortgagees, that the testator's estate should be sold, and the money arising by the sale of the estate should be applied in payment of the mortgages, was directed to be applied in payment of what shall be remaining due to the other creditors of the testator *pari passu*. And if any of the creditors of the testator's specialty have exhausted any part of the testator's personal estate in satisfaction of their debts, then they were not to come in for a share of the real estate.”

(1) *Vide Cole v. Warden*, 1 Vern. 410. *Plucknet v. Kirk*, *ibid.* 411. *Sawley v. Gower*, 2 Vern. 61. *Trevor v. Perryor*, 1 Cha. Ca. 148. *Bartrop v. West*, 2 Cb. Rep. 62.

(2) *Scus* where the mortgagor has himself but a term of years. *T* of the creditors of Sir *Charles Co W.* 341. *Hartwell v. Chitters*, 1 A

receive any further satisfaction out of the testator's real estate, until the other creditors shall thereout be made up equal to them (1)."

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(1) *Reg. Lib. B.* 1741. fol. 228.

Wharton versus Wharton, May 3, 1740. Petitions.

Case 212.

THE Dutchess of *Wharton*, who is the defendant, petitions that she may be at liberty to amend her answer by adding a new fact.

The defendant prayed to amend her answer, by adding a new fact; granted on the particular circumstances of her case (1).

LORD CHANCELLOR,

The most common case of amending answers is, where rough inadvertency a defendant has mistaken a fact, or a date, ere the court will give leave it shall be amended, to prevent a defendant from being prosecuted for perjury.

Where a defendant has mistaken a fact, or a date, the court will give him leave to amend his answer.

But here the question is, Whether the court, upon such an amendment, will likewise permit a defendant to add any new & to the answer; and, upon the circumstances of this case, I am of opinion the defendant ought to have this liberty.

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*Fallow v Gild
1 Phillips 5*

The Dutchess of *Wharton*, in her answer, refers to marriage articles, which were executed in *Spain*, and consequently makes incumbent upon her to produce them: Now it seems the custom in *Spain* is, to deposit articles, and other deeds, in places pointed for that purpose, so that an authentic copy is all that can had in this case.

Therefore, I am of opinion, that the Dutchess ought to have liberty to amend her answer, so far as to set forth the custom in *Spain*, with regard to the depositing of deeds.

(1) *Vide Mitford's Pleadings* 260. 619. 2 *Cox's P. W.* 427. note 1. *Phillips v. Gwynne*, note (x) *ibid.* *Pearce v. Grove*, page 3 vol. 522. *Forster v. Forster*, 2 *Bro. Cha. Rep.* 616.

Drapers' Company versus Davis, May 4, 1742.

Case 213.

A Petition was preferred against *Meredith*, the solicitor in the cause, complaining of improper and heavy charges in his bill; and of his taking a judgment of one of the parties for 400*l.* whilst the cause was depending, and before it could be known at his bill would come to.

A solicitor having taken a judgment of his client for 400*l.* whilst the cause was depending, and also several extraordinary

charges appearing in his bill; Lord Hardwicke, though adjusted and allowed seventeen years ago, referred the bill to be taxed, and ordered the judgment and other securities to be delivered up.

LORD CHANCELLOR,

Notwithstanding this bill has been adjusted and allowed some years ago, yet the behaviour of the solicitor in taking a judgment, is an imputation upon him, and is a practice I can by no means

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M. d. R. 26;*

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means approve; and as it does not appear, that his client was assisted by any person of the profession, in looking over and settling this bill, and as there are several very extraordinary *items*, and improper charges upon the face of it, I shall, notwithstanding the great length of time (being ever since 1725), and notwithstanding the adjustment, and allowance, refer this bill to a Master, to be taxed; and likewise order Mr. *Meredith* to be examined upon oath on interrogatories, as to the several articles of it, and do order the judgment, and other securities to be delivered up immediately (1).

(1) *Vide Walmsley v. Booth*, ante 25. *Glass, post.* 298. note 1. *Osmond v. 27. 29. 1 Ves. 380. 2 Ves. 138. Oltham v. Fitzroy, 3 Cox's P. W. 131. 5th ed. Hand, 2 Ves. 259. 549. Saunderson v.*

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Pawlet versus The Bishop of Lincoln, May 6, 1742.

Cafe 296.

If at the hearing, a plaintiff waves the relief he prays against a particular person, the objection for want of his being a party will have no weight.

A Plaintiff may, at the hearing of a cause, wave the relief that he prays against a particular person, and then the objection for want of making that person a party, will have no weight with it.

On a bill for an account of fees, to establish a right, you must have all persons before the court who have any pretence to a right; for they will be bound by a decree here; otherwise as to a judgment at law, which will not bind the right of a third person.

In an action at law brought for fees, it is not necessary to make any person a party, but who has actually received the fees; it is otherwise in equity, where a bill is brought for an account of fees, to establish a right, because there you must have all persons before the court who have any pretence to a right (1); for, by a decree of this court, they will be bound; but it is not so as to a judgment recovered at law for fees, against the receiver of those fees; such judgment will not bind the right of a third person.

(1) *Poore v. Clark, post.* 515.

Cafe 215.

Sir William Saunderson versus Glass, May, 11, 1742 (1).

LORD CHANCELLOR,

A solicitor makes an absolute conveyance to himself of 1000 l. from the plaintiff's wife, whilst she was parted from her husband; The considerations expressed in the deed, are ~~services done, and favours shown~~; the bill is brought to set aside the deed as obtained by fraud. *Lord Hardwicke, on all the circumstances of this case, decreed the deed should stand only as a security for such sum as was justly due to the defendant.*

THERE is evidence in this cause which has weight on both sides; but it is necessary for the court to determine on such circumstances as weigh most strongly.

~~The~~

(1) The plaintiff's wife, by virtue of her marriage articles, had a power to charge certain premises with 1000 l. after her death. No settlement was made in pursuance of the articles. The wife absented herself from the plaintiff, and

There are two grounds for this bill.

First, To set aside a deed obtained by the defendant from *Lady Saunderson*, the plaintiff's wife in her life-time, as a fraudulent one.

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The other ground is, That the deed was intended as a conveyance in trust only for the daughter of *Lady Saunderson* though the defendant has not made any declaration of such trust.

It has been contended by the defendant's counsel, that the two heads are inconsistent, but I think otherwise, for not preparing the deed which was to declare the trust, is equally a fraud, or, at least, an evidence of fraud.

First, I shall consider the particular circumstances of this case. [297]

Secondly, How far the acts themselves are an evidence of this trust.

As to the first, Here was a wife, as the defendant insists in an extreme bad state of health, very cruelly used by her husband, and under a necessity of parting from him.

On the other hand, The plaintiff charges, that she was greatly addicted to drinking, in all parts of the day, and very often intoxicated with liquor, and this is not at all controverted by the defendant.

What is the consequence to be drawn from such a behaviour, but that she must necessarily be a weak woman, for, under these circumstances, she must stand on very unfirm ground, both as to her honour and her fortune: with regard to the latter she had a power to dispose of 1000*l.* whether covert or discover, as she should think proper, by any writing under her hand: now the draft of this deed, which is an absolute conveyance of the 1000*l.* to Mr. *Glass*, the defendant, had been prepared six weeks before it was executed, and likewise before *Lady Saunderson* left her husband; and the deed itself was not executed till three weeks afterwards: for, on the 6th of *March* 1737, she left the plaintiff, and went to a lodging which Mr. *Glass* had provided for her; and on the 29th of *March* she executed the deed which is now in contest before the court.

Now what could be a greater instance of weakness than, at the very time she was upon the brink of parting, to put the only thing out of her power that could support her independent of her husband; consider it in another view, with regard to her child, which she is proved to have been very fond of: The husband too had a daughter by another venter: Is it probable then, that

executed the power of appointment in favour of the defendant (an attorney) in consideration of the services he had rendered her. After the wife's death, the plaintiff paid the defendant several sums of money due to him on the wife's account, for which he gave a receipt in full: but now insists he had other claims upon the wife, though he could not make

any legal demand for the same. His Lordship, with the consent of the plaintiff and defendant, decreed, that the deed of appointment should be delivered to the plaintiff to be cancelled, and that the defendant should execute a release of all his right under the appointment. *Reg. Lib.* 1741. fol. 428.

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Lady *Saunderson* would give away this 1000 *l.* from herself and her child, who might have no other provision? for nothing attests the affection of one parent so much, as the other parent's taking away the child from under his power, and therefore the highest weakness to leave her daughter quite destitute, and to the mercy of an enraged father.

It appears in the cause, that she had made a will but just before this time, by which she gave the 1000 *l.* absolutely for the child's benefit; now, what occasion or pretence could there be for altering this will.

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Mr. *Glass*, to be sure, had done acts of kindness privately for Lady *Saunderson*, but at the same time he was her attorney, and, in that capacity, was it not his duty to let her know the absurdity of the act she was doing? I am not at all clear, the woman knew that this deed would absolutely bind her; it required the skill of a lawyer to resolve that, for powers are given in a different manner, some, if once executed, are final, others may be executed *testes quoties*.

The considerations in the deed are expressed to be for services done, and favours shewn.

If an attorney *pendente lite*, prevails on a client to agree to an exorbitant reward, the court will either set it aside intirely, or reduce it to the standard of those fees to which he is properly intitled.

It is truly said at the bar, that a security obtained by an attorney, whilst he is doing business for his client, or whilst a cause is depending, appears to this court in a quite different light than between two common persons; for if an attorney, *pendente lite*, prevails upon a client to agree to an exorbitant reward, the court will either set it aside intirely, or reduce it to the standard of those fees to which he is properly intitled; and this was the rule that weighed with me in *Walmsley v. Bosth*, heard May the 2d, 1741 (1); and if the court did not observe such a rule, it would expose clients very much to the artifices of attorneys, especially *ferme covert*s who are in Lady *Saunderson*'s unfortunate circumstances.

It is true, there are witnesses which prove some declarations of Lady *Saunderson*'s great regard for Mr. *Glass*; and that she has often said, no body should have the 1000 *l.* except himself; but then the very same witnesses say, it was to make him a satisfaction for the sums he had advanced for her, and likewise out of a confidence that he would take care of her daughter.

But, on the other hand, nothing can be stronger to encounter this evidence, than what the plaintiff's witnesses swear, one of them in particular, who said she was with Lady *Saunderson* but two days before her death, and that she then declared she had given all to her child.

A very suspicious circumstance to shew that the defendant was conscious this deed was never intended as an absolute conveyance to himself, but only in trust, is, his denying there was any deed at all in his custody, when Sir *William Saunderson* asked him at the time he paid him his bill.

The only material reason for his concealing it then, must be to prevent its being sifted and inquired into, Lady *Saunderson* being

(1) *Ante* 25. 27. S. C. and notes. *Drapers' Company v. Davis*, *ante* 295. note 1. alive,

alive, who could have discovered the real design and intention of it; for the reason he gives in the cause is a very simple one, for fear of exasperating and incensing Sir *William Saunderson*, who at that time was reconciled to his Lady.

There is one observation of the plaintiff's counsel which is very material, that the defendant has charged in his bill, so much for perusing the draft of this deed, which he would never have done, if he had looked upon it as a voluntary present to himself; and therefore this circumstance shews very strongly that he considered it merely as a trust.

Lady *Saunderson* died in *June* 1738; the daughter in *April* following; and the defendant's letter, by which he demanded the 1000*l.* of Sir *William Saunderson*, by virtue of this deed, was not written till above a year and a half after their deaths.

In the beginning of it he says, Your lady having a confidence in my honour and integrity towards your's and her child, and being likewise sensible of the services I had done her, and the favours she had received from me, did execute, &c.

Now, trust and confidence are convertible terms⁽¹⁾, and must import some trust relative to the act of the deed, for the benefit of the child; and at the same time a compensation to him for favours and services: this latter part materially falls in with Lady *Saunderson's* declarations of her having secured to Mr. *Glass* the several sums he had advanced upon her account.

What is the result of the whole, but that here is a plain trust intended for the daughter, mixed and coupled with a recompence for the defendant, for sums advanced, and services done, and a security to him at all events, if Sir *William Saunderson* should refuse to pay him; and after the defendant was satisfied, the residue for the daughter; nor can this transaction be any other way reconciled with the declarations of Lady *Saunderson*.

This way of considering the case, makes it reconcileable with reason; the other makes it absurd, and the act of a weak woman.

The consequence of my opinion will be this, if there are any sums remaining, which are justly due to the defendant, the deed, in the first place, ought to stand as a security for that sum, whatever it is, but the surplus must be deemed to be a trust for the child, who being dead, the plaintiff, though he has not administered, is legally intitled to, as, by her death, it devolves upon him; and this decree is exactly conformable to the directions my Lord *Talbot* gave in the case of *Proof v. Hines*, Cases in the time of Lord *Talbot*, 111.

(1) *Vide* the essay on uses and trusts, 17. 18.

Case 216.

Nicholls versus Judson, at the Rolls, May 24, 1742.

W. L. gave *A. M.* a bond for 300*l.* and interest, in 1728, and in 1731 paid her 100*l.* in 1736 he made his will, and gave all his lands in *B.* for a term of 200 years, upon trust to raise and pay, within two years after his death, to *A. M.* 200*l.* and also devised other lands to the same trustee for 300 years, on trust to pay 200*l.* to *A. M.* within one year after his death; the executor of *L.* paid some part of the bond to *A. M.* in her life-time; the bill prays that the legacies may be decreed a satisfaction of the bond, and that her executor may refund what he has received in part payment thereof: *The Master of the Rolls* held this to be a contingent legacy; for if the legatee had died before the time of payment, it would have sunk in the land, and that the rule of ademption not extending so far as to take in a contingent legacy, this is not a satisfaction of the bond (1).

Prayer
Mansfield
5 June 1742

The executor of *Lowe* paid off some part of the bond to *Ann Mansfell* in her life-time.

The prayer of the bill is, that the legacies devised by the will of *William Lowe* to *Ann Mansfell* may be decreed a satisfaction of the bond; and that the defendant *Judson*, who is her executor, may be directed to refund such sums as he has received in part payment of the said bond from the executors of *Lowe*.

For the defendant *Judson* were cited, *Cuthbert v. Peacock*, 1 Salk. 155. *Atkinson v. Webb*, 2 Vern. 478. *Chancey's case*, 1 P. Wms. 408. *Eastwood v. Winke*, 2 P. Wms. 616.

Master of the Rolls: The question is, Whether two sums of 200*l.* and 200*l.* devised to *Ann Mansfell*, by the will of *Lowe*, and to be raised upon the testator's real estates by different terms of years, shall be considered as a satisfaction of the debt, due upon the bond to Mrs. *Mansfell*.

It was objected by the counsel for the plaintiff, that this is not in the nature of a legacy, for that there is a difference in the expression of the will, for in some instances he says expressly, I give such things to the said *Ann Mansfell*, as plate, linen, &c. but as to the 200*l.* and 200*l.* it is a direction to trustees to levy, raise, and pay the said sums to Mrs. *Mansfell*.

There is no manner of difference between a direction to trustees to pay, and a gift, the testator is equally the donor in both cases.

But it is answered very clearly by this observation, that though the money is to be raised by the trust-estate, yet it is the gift of the testator notwithstanding, for it would have been absurd to

(1) With respect to satisfaction of debts, by a debtor giving a legacy to his creditor, see 1 Cox's P. W. 410. as to

satisfaction of portions and legacies, see *Bellasis v. Utb watt*, ante 1 vol. 426. note.

have said, that the trustees should give, for that would have made them the donors, and not the testator; and therefore there is no manner of difference between a direction to trustees to pay, and a gift.

NICHOLLS v.
JUDSON.

And tho' the general rule is, that a legacy which is greater, or as great as the debt, shall be taken to be a satisfaction, and is too well established to be shaken now; yet, in late cases, where there are circumstances, or a presumption that the testator's intention was not that the legacy should be an ademption of the debt, the court have leant against the rule, so far as to hold it not to be a satisfaction.

Though it is a rule that a legacy greater, or as great as the debt, shall be taken to be a satisfaction; yet where there is a presumption the testator's intention was otherwise, the Court, in late cases, have leant against the rule.

tion was otherwise, the Court, in late cases, have leant against the rule.

So, in the present case, the testator's directing that the 200*l.* and 200*l.* should not be paid till one or two years after his death, is a very considerable circumstance in favour of Mrs. *Manfell*, and shews strongly, that the intent of the testator was not that it should go in satisfaction of the debt, for the bond was payable immediately, and the testator had no right to suspend the payment of a debt, tho' he might suspend his legacy; and though executors have a year allowed them to pay legacies, yet that does not extend to debts, but they are liable to be sued the moment after the testator's death; so that the payment of these legacies at a future time is extremely material, and takes this case out of the general rule.

Tho' executors have a year to pay legacies, yet that does not extend to debts, but they are liable to be sued the moment after the testator's death.

Besides too, I am inclined to think this is a contingent legacy; for the trustees being directed to pay it within two years and one year, does not oblige them to pay it sooner; and if the legatee had died before the time of payment, it would have sunk in the land, for the benefit of the plaintiff, according to the settled rule of this court, with regard to legacies charged upon land. *Vide Pawlet's case*, 2 Vent. 366. *Stapleton versus Cheales*, Prec. in Chan. 317. *Duke of Chandos versus Talbot*, 2 P. Wms. 601. *Hall versus Terry*, November 8, 1738. 1 Tr. Atkyn's Rep. 502. *Prowse versus Abbingdon*, Easter term, 1738, 1 Tr. Atkyn's Rep. 482 (1).

And as the rule of ademptions has never been carried so far as to take in a contingent legacy, I must decree for the defendant, that the devise of the 200*l.* and 200*l.* is not a satisfaction of the bond.

(1) *Weedon v. Fell*, ante 125. notes.

Case 217. *The Mayor and Corporation of York versus Sir Lionel Pilkington*

May 14, 1742.

S. C. ante 1 vol. 282.

2 Vef. 397.

While suits are depending here, the plaintiffs indicted the defendant's agent at the sessions, where they themselves are judges, for a breach of the peace. Lord Hardwicke made an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause, and further order.

THE plaintiffs claim the sole right of fishing in the river. Onse; the defendant claims a right likewise; a bill and a cross bill were brought, to establish their several rights.

While these suits were depending, the plaintiffs caused the agent of the defendant to be indicted at York sessions, where they themselves are judges, for a breach of the peace, in fishing in their liberty.

A motion was made on behalf of the defendant, to stop the prosecution.

LORD CHANCELLOR,

There is no restraining power over criminal prosecutions in this court (1).

The Attorney General of course grants a *noli prosequi* to a criminal prosecution, where an action of trespass will lie.

This court has not originally, and strictly, any restraining power over criminal prosecutions; and, in this case, if the defendant had applied to the Attorney General, he would have granted a *noli prosequi*.

For when a complaint is grounded on a civil right, for which an action of trespass would lie, the Attorney General of course grants a *noli prosequi*.

This is a complaint merely for fishing in the river, without any actual breach of the peace, which the mayor and corporation say, is a trespass upon them.

If it could be made appear at law, that the plaintiffs were both judges and parties, it might come out to be *coram non judice*, but it might be difficult to make out this.

Pendente lite here, this court would have stopped an action of trespass *vi et armis* (2).

If actions of trespass had been brought *vi et armis*, this court would have stopped them; but though I cannot grant an injunction, yet I may certainly make an order upon the prosecutors to prevent the proceeding on the indictment.

[303]

Where a bill is brought to quiet possession, if after that the plaintiff prefers an indictment for a forcible entry, this court will stop the proceedings upon such indictment.

Supposing it was a suit for a right of land where entries had been made, and the bill was brought to quiet the possession, and after that they prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace, and is also a civil right, this court would certainly stop the proceedings upon such indictment.

Where parties submit their right to the court, they have certainly a jurisdiction, and may interpose.

(1) *Lord Montague v. Dudman*, 2 Vef. 396. (2) *Fide 1 Eq. Ab. 131. pl. 6.*

Therefore I will make an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause and further order. Mayor, &c. of YORK v. PICKINGTON.

Lockwood and others versus Ewer, May 14, 1742.

Cafe 218.

THE bill in this case was brought by the plaintiff, as representative of Sir Thomas Cooke, to redeem the sum of 2500*l.* *East-India* stock, transferred to Mr. Ewer the 1st of April, 1708, for the securing the sum of 2000*l.* and interest at 6*l.* per cent. Mr. Ewer having executed a defeasance, whereby he obliged himself to re-transfer the stock on payment of the 2000*l.* and interest on the 2d of July following.

The representative of Sir T. C. prays to redeem 2500*l.* *East-India* stock, transferred to the defendant the 1st of April, 1708, for securing 2000*l.* and interest at 6*l.*

per cent. to be re-transferred on payment of principal and interest the 2d of July following. Sir T. C. died in 1709, the son brought this bill in 1729. Lord Hardwicke, refusing to decree a redemption, dismissed the bill.

Sir Thomas Cooke died in 1709; his son, the surviving executor, has brought this bill to redeem in 1729 (1).

LORD CHANCELLOR,

This is a very plain case for the defendant.

In a mortgage of land, a bill of foreclosure ought to be brought, but on a mortgage of stock it is not necessary, and therefore a strong reason for the mortgagor's departing from the right.

Not necessary to bring a bill of foreclosure on a mortgage of stock (2).

The admission of a co-defendant to the advantage of the plaintiff, will by no means better the case, unless the plaintiff had entered into proof, by which he would infer some other kind of evidence to account for his coming so late to redeem.

A co-defendant's admission to the advantage of the plaintiff, will not make his case better.

It would be of mischievous consequence if I should decree a redemption in this case, for the bill would never have been brought, if the *East-India* stock had not increased in value, which is merely an accident, and could not be foreseen at the time the mortgage was made, and therefore is very far from being an inducement to decree a redemption. His Lordship dismissed the bill.

[304]

(1) The length of time in this case (if no interest had been paid nor demand made) would, it seems, have barred the

plaintiffs' right of redemption. See *Aggas v. Pickrel*, post. 3 vol. 225.

(2) So *Tucker v. Wilson*, 1 P. W. 261.

Case 219.

Trodd verſus Downs, May 18, 1742 (1).

Whatever words there may be in a will relative to copyhold lands, they can have no effect if there was no ſurrender, for nothing can paſs a legal eſtate, but what will paſs it in law (2).

ADAM Churcher deviſed all his farms and lands to truſtees and their aſſigns, for and during and until his kinſmen *Rogers* and *Bonny* ſhould attain their ſeveral ages of 21, in truſt that they do, in the mean time, receive the rents and profits for the uſe and benefit and towards the maintenance of *Rogers* and *Bonny*; and after they ſhould attain their reſpective ages of 21, then to the ſaid *Rogers* and *Bonny* for their natural lives, without impeachment of waſte; and from and after their deceaſes, to the uſe of the heirs of the ſaid *Rogers* and *Bonny* for ever as tenants in common, and not as joint-tenants.

Part of the premiſſes were copyhold, and the reſt freehold; the teſtator ſurrendered the copyhold to the uſe of his will: *Bonny*, one of the deviſees, attained his age of 21, and by leaſe and releaſe of the 31ſt of *May* and 1ſt of *June*, 1740, conveyed his moiety in the freehold lands to his ſiſter and her heirs, who married the plaintiff, and afterwards *Bonny* deviſed his copyhold lands in like manner, but made no ſurrender thereof.

Bonny is dead; the queſtion made in this cauſe is, whether the deviſees, *Rogers* and *Bonny*, ſhould take as joint-tenants, or tenants in common.

LORD CHANCELLOR,

There are two points in reſpect of the copyhold:

Fiſt, Whether the deviſe in the will of *Adam Churcher* amounts to a deviſe of land in joint-tenancy, or a tenancy in common (3).

Secondly, If a joint-tenancy, whether there has been a ſeverance of that joint-tenancy, before the death of *Thomas Bonny*.

I am of opinion, the truſtees took nothing at all in the inheritance but a *chattel* intereſt (4), till *ceſtuyque truſts* attained the age of 21, or the ſurvivor of them attained that age.

The truſt is to apply the rents and profits towards the maintenance, &c. and on their reſpectively attaining 21, is deviſed over. Therefore I am of opinion, if one of them had died, ſurviving the other, who had not attained his age of 21, all the profits muſt have been applied to the maintenance of the ſurvivor.

[305] This being the conſtruction of the firſt clauſe, will throw a great deal of light upon the ſubſequent clauſe.

(1) *Reg. Lib. B.* 1; 41. fol. 406.

(2) *Hawkins v. Leigh*, ante 1 vol. 388. *Allen v. Poulton*, 1 *Veſ.* 122. *Milbourn v. Milbourn*, 2 *Bro. Cha. Rep.* 64. *See* *vide Byas v. Byas*, 2 *Veſ.* 165.

(3) *i. e.* a joint-tenancy or tenancy in common during the lives of *Bonny* and *Rogers*.

(4) *Cordal's caſe*, *Cro. Eliz.* 315. *Hilchins v. Hilchins*, 2 *Vern.* 404. *Carter v. Barnardifton*, 1 *P. W.* 505. 509. *Robert v. Dixwell*, ante 1 vol. 609. But where there is an expreſs truſt to ſell, &c. there the truſt cannot be executed unleſs the truſtees take the whole legal fee. *Vide Bagshaw v. Spencer*, poſt. 578. 1 *Veſ.* 144.

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DOWNER.

As to the latter, I am of opinion it is a devise of a remainder in a legal estate, and not of a trust, for the trust, as I said before, was only a chattel interest; for it is to *Rogers* and *Bonny*, there is a devise for their natural lives, &c. This being so, consider the intention of the testator; his intention was plain that *Rogers* and *Bonny* should be tenants for lives, and therefore adds these words, *without impeachment of waste*.

If that intention had not been controuled by a rule of law, they had been most clearly tenants for life, which brings it very near the case of *Tuckerman* versus *Jeffereys*, *Easter* term, 6 *Ann.* *all's Cases* 370.*

In 1 *Co. Rep.* 104. it is laid down as a rule of law, That when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited thereafter mediately or immediately to his heirs, in fee or in tail, at all times, in such cases, *the heirs* are words of limitation of the estate, and not words of purchase, and the words *impeachment of waste* are rejected (1).

But then the question is, Whether this shall over-rule the plain intention of the testator; for I have shewn it was not his intention that they should have the joint inheritance.

Where the rule of law will let the intention take place, it shall have its effect, *vide Barker* versus *Giles*, 2 *Wms.* 283. before Lord *King*, and afterwards in the House of Lords, *Blisset* versus *Tomlinson* and others, 3 *Lev.* 373. there by force of the words *equally to be divided*, it was held a tenancy in common, and the words *neither liver of them* rejected (2).

This case differs from that; as I am of opinion, upon the construction of the first clause, that the whole profits will go and arrive for the education and maintenance of the survivor till 21: now it would be absurd to think that the testator would give the whole profits to be applied for the maintenance of the survivor *à cestuy que trust*, and yet that the moiety, after the survivor attained 21, should go to the heirs of the deceased *à cestuy que trust*.

But then the freehold is severed by *Bonny's deed of conveyance*, [306] and must have its effect.

But as to the copyhold it is not severed, for nothing can sever a legal estate, but what will pass it in law; and here has been no surrender of the copyhold, and whatever words there may be in the will, relative to the copyhold, can have no effect; "and therefore I declare that the defendant *John Rogers* is intitled to the copyhold estate in question, by survivorship during his life, and to the inheritance of one moiety thereof, and I do di-

* There a man devised his estate to his two sisters, *Jane* and *Elizabeth*, during life, equally to be divided between them, and after the decease of them to the heirs of *Jane*. The court held that *Jane* and *Elizabeth* were joint-tenants during life, and the fee to the heirs of *Jane*, but not to take during *Elizabeth's* life.

(1) *Vide ante* 249. *Lord Glenorchy* v. *Franks*, *Ca. temp. T.* 11. 18. *Papillon* 524. *Pitt* v. *Benyon*, 1 *Bro. Cha. Rep.* 589. *Armstrong* v. *Eldridge*, 3 *Bro. Cha. Rep.* 215.
(2) *Vide Hawes* v. *Hawes*, *post.* 3 vol. *Voce*, 2 *P. W.* 477. *Bagshaw* v. *Meer*, *post.* 570. 576.

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“ rect an account to be taken of the rents and profits of the freehold and copyhold estates of *Adam Churcher*, to the death of *Thomas Bonny*; and decree, that the balance be divided into two moities, and that one moiety thereof be paid to *Maria*, the wife of the plaintiff *John Trodd*, and executrix of her husband *Thomas Bonny*; and the other moiety to the defendant *John Rogers*; and I also direct an account to be taken of the rents and profits of the said freehold estate accrued since the death of *Thomas Bonny*, and decree that one moiety of what shall be coming on the account be paid to the plaintiffs, and that the freehold estate be equally divided between the plaintiffs and the defendant *John Rogers*, and that a commission do issue for that purpose.”

Case 220.

Jackson versus Butler and others, May 24, 1742 (1).

Mortgages were put into *Butler's* hands, to receive the principal and interest, who pawned them to the defendant *Spring* for 100*l.* *Butler* likewise gave a note in his own name for the payment, and took a note also of *Spring* to return the deeds upon payment of principal and interest on the 100*l.*

THE bill was brought against the defendant *Butler*, for refusing to deliver deeds, the one a mortgage, and the other an assignment of a mortgage, which were put into his hands, in order to receive the principal and interest, and who had abused his trust, by pawning them to one *Spring* for 100*l.* for which *Butler* likewise gave a note in his own name for the payment, and took a note also of *Spring* to return the deeds upon payment of principal and interest on the 100*l.*

Lord Hardwicke held, that as the pawner must, by the deeds, appear to have no property, he could not avoid decreeing *Spring* to deliver the deeds to the plaintiff, and leave the pawnee to his remedy at law against *Butler*.

LORD CHANCELLOR,

A bill here for the recovery of the deeds proper; for in an action of trover, the plaintiff could only have damages for the detainer.

The plaintiff might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themselves, and therefore is proper in bringing a bill here for the recovery of his deeds.

[307]

There seems to be little or no defence insisted on for the defendant *Butler*; and indeed a servant who has plate under his care, and who may commit felony of that plate, as he has neither a general or special property, might full as well justify the raising a sum of money for his own use, by imposing it upon the lender as his property, which is a stronger case than the present, plate may have no mark upon it; but it is impossible the defendant *Butler* could impose upon another, for by the deeds themselves he must appear to have no property; and even supposing it to be an attorney, who had deeds delivered to him, unless there is a bill due to him from the person who delivered them, he cannot justify detaining them (2).

The defendant *Spring* not appearing to have acted dishonestly but indiscreetly, was decreed to deliver the deeds to the plaintiff but without costs, and left to his remedy at law against the defendant *Butler*, upon the note for 100*l.*

(1) *Reg. Lib. A.* 1741. fol. 550. (2) *Vide Grey v. Cockeril*, ante 11

see *Chaplin of Wells*
in *Chadlington*
2. *Collyer*. 73.

Trelawney versus Booth, before Lord Hardwicke, cited in the cause of Petty and Barker, June 2, 1742. Case 221.

THE plaintiff, at the request of Mr. *Booth*, lent him 500*l.* upon a note only, which he was encouraged to do, on *Booth's* assuring him by letter he was very safe, for an aunt of his, by her will, had left him 4000*l.* which the court of Chancery had decreed him; but *Booth* dying soon after, and the representative refusing to pay the 500*l.* the bill was brought against him for the money; the defendant made it appear in the cause, that the 4000*l.* was not merely as a pecuniary legacy, but directed to be laid out in land, and settled upon Mr. *Booth* in fee; and the decree having pursued the will, *Lord Chancellor* was of opinion to dismiss the bill, but said, at the same time, it was a very cruel case, and yet the plaintiff can have no relief, as it is the established rule of the court, that money devised to be laid out in land, shall be considered as land (1), and therefore he could not break through it, notwithstanding the particular hardship of this case, so as to let in a simple contract creditor upon money so devised.

The plaintiff lent *B.* 500*l.* on note, on assurance that an aunt had left him 4000*l.* by will; *B.* died soon after, and his representatives refused to pay the 500*l.* as the legacy was directed to be laid out in land, and settled on *B.* in fee; *Lord Hardwicke* said, it was a very cruel case, but as money devised to be laid out in land is considered as land, the plaintiff can have no remedy.

(1) *Vide Green v. Smith, ante 1 vol. 572. Guidot v. Guidot, post. 3 vol. 254. and references.*

Lord George Beauclerk versus Miss Dormer, heard at Powis House, June 17, 1742. [308]

THE question in this cause arose upon the following will of General Kirk, dated January 1, 1742.

executrix, and if she dies without issue, then to go to Lord George Beauclerk; *D.* levied a fine, and suffered a recovery of the real estate, and insists she has an absolute right both to the real and personal estates of the testator, and not obliged to account: *Lord Hardwicke* held, the limitation over was void, and cannot be confined to the defendant's dying without issue living at the time of her decease, and dismissed the bill (1).

Case 222.

K. by his will says, I make *D.* my sole heir and

" Miss Dormer I make my sole heir and executrix; if she dies without issue, then to go to Lord George Beauclerk; he to pay Lady Diana Beauclerk 5000*l.* to Betty Gibbs and her granddaughter 100*l.* each, and Miss Dormer to keep the old woman; he then gives all his cloaths to one servant; his horses to another; and pecuniary legacies to all the rest; and

Campbell
Marling
2 Russ. & M.
Crowder & St.
3 Russell. 2.

(1) *Vide Boucher v. Antram, 2 Cha. Rep. 65. Seale v. Seale, 1 P. W. 290. Anon. 2 Freem. 287. Dod v. Dickinson, 8 Vin. 451. pl. 25. Ivie v. Ivie, ante 1 vol. 429. Trafford v. Bohem, post. 3 vol. 449. Butterfield v. Butterfield, 1 Ves. 133. 254. Stafford v. Buckley, 2 Ves. 170. 261. Garth v. Baldwin, 2 Fes. 646. At-*

torney General v. Hind, 1 Bro. Cha. Rep. 170. Bigge v. Deasley, 1 Bro. Cha. Rep. 188. Glover v. Strathoff, 2 Bro. Cha. Rep. 33. Robinson v. Fitzberbest, 2 Bro. Cha. Rep. 123. Boden v. Watson, Amb. 398. Everist v. Gell, V. s. jun. 230. Vide etiam Hodgson v. Buffe, ante 89. note 1.

the
353.
1 Ch. & F. Fin
171.

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" the will was signed by him, in the presence of three witnesses."

The bill is brought in order to have an inventory from the defendant upon oath, of all the personal estate of *Kirk*, and that the plaintiff's interest in the personal estate may be established by a decree of this court, and that the inventory may remain as an evidence of the personal estate, in case the contingency should happen, on which the plaintiff becomes intitled.

The defendant has levied a fine, and suffered a recovery on the real estate, and insists that she has an absolute right both in the real and personal estates, and that she is not obliged to account.

Mr. Noel, for the plaintiff, cited *Donne versus Merryfield*, heard the 22d of October, 1734, and mentioned in *Sabbarton versus Sabbarton*, *Stanley versus Lee*, 2 P. Wms. 686. *Atkinson versus Hutchinson*, 3 P. Wms. 258. *Forth versus Chapman*, 1 P. Wms. 663. *Sabbarton versus Sabbarton*, Cases in the time of Lord Talbot, 55 & 245.

Mr. Clark, of the same side, cited 1 Leon. 285, *Lee's case*, *Higgins versus Dravler*, 1 P. Wms. 98.

What was chiefly insisted on by the counsel for the plaintiff, was the intention of the testator, that if the defendant died without issue living at her death, that then Lord George should take subject to the payment of the 5000 l. to Lady Diana Beaucherk.

[309]

LORD CHANCELLOR,

There is no doubt as to the intention; but then the question will be, whether the dying without issue is to be restrained to the time of her death, or at any time indefinitely.

Mr. Murray, of the same side, cited cases to shew that the vulgar meaning of the words, dying without issue, which is leaving no issue at the time of the death, has always been regarded by the court. *Nichols versus Hooper*, 1 P. Wms. 198. *Pinbury versus Elkin*, 2 Vern. 758. *Target versus Gaunt*, 1 P. Wms. 432. *Whitmore versus Weld*, 1 Vern. 326. 2 Vent. 367. 2 Ch. Ca. 167. *Bellasis versus Uthwatt*, 1 Tracy Atkyns 426.

Mr. Attorney General, for the defendant, insisted, that the whole real and personal estate is given to Miss *Dormer*, till there is a failure of issue generally, and if it had stood singly upon the word sole heir and executrix, there can be no doubt, but Miss *Dormer* would have been intitled to the absolute property in both.

He cited cases that were subsequent to those mentioned for the plaintiff.

Green versus Rodd, June 21, 1729 (1), before Lord Chancellor King: The testator there directed his whole personal estate should be turned into money, and placed out at interest, in the first place, to the use of his sister *Mary*; and in case his sister died without issue, then my will and meaning is that the money directed to be put out to interest, shall be divided between my

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5 other sisters, *Teresa* and *Frances*, after the death of my sister
my aforesaid.

Sir *Joseph Jekyll* held the bequest over to be too remote, and
therefore a void limitation.

Milward versus *Milward*, *February 1, 1734*, before the same
after of the *Rolls*.

One *Milward* made a nuncupative will, directing, that all his
ortgages and debts should go to his sons *John* and *Samuel*,
ying 100 *l.* each; and in case either of them shall die with-
ut issue, his part thereof shall go to my wife, and my two othe
ons.

His Honor was of opinion, in the first place, that this was
tenancy in common, and not a joint-tenancy; and, in the
next place, that the limitation to the wife, and other sons, was
too remote, and therefore void.

Mr. *Brown*, on the same side, cited *Richards* versus *Lady*
Abergavenny, 2 *Vern.* 324. *Clare* versus *Clare*, *Cases in Chan.*
in the time of *Lord Talbot*, 21. in order to shew that this limita-
tion is to the defendant's issue generally, and the remainder to
Lord George, consequently void, as being too remote.

As to the current of cases upon this head, the former, he
said, went too far one way, and of late quite the contrary, but
here is not one of the modern cases, where there are not some
words which shew the intention of the testator, that the first
aker should only have an estate for life, and therefore qualified
be general estate, which the words would otherwise have given.
Love and *Windham*, 1 *Sid.* 450.

Mr. *Ord*, for the defendant, said, all the cases cited for the
laintiff are trusts, in which the court lay hold of any minute cir-
cumstance to support the intention.

It is allowed, on all hands, the testator intended Miss *Dor-*
er should have an estate-tail in the real estate, and unless it is
 likewise construed to give her an estate-tail in the personal, the
ords will be inconsistent, and have two different meanings,
at the construction we contend for, gives the words an uni-
form and consistent meaning.

Mr. *Noel*, in reply, said he did not apprehend that one ge-
neral rule is to be laid down in these cases, but the court will, in
each particular case, put such construction as will best suit with
the testator's intention.

That there are circumstances here which shew the intention of
the testator was to confine the bequest to *Lord George Beauclerk*,
on Miss *Dormer*'s leaving no issue at the time of her death, and
laid the greatest stress upon the word *then*, *if she dies without issue*,
as to go &c. as referring to a dying without issue, at the time of
her death.

It does not follow, if the court should be of opinion the tes-
tor has used such words with regard to the real estate, as will
take effect according to his intention, because repugnant to a
rule of law, that therefore his intention shall not prevail with re-
gard to the personal estate.

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v. DORMER.

LORD CHANCELLOR,

There are a great variety of cases upon the head on which arises, of contingent limitations upon personal estate, and they have grown up to a very large number, they have admitted of many niceties, and different determinations.

[311] The *first* question is, Whether there is any particular circumstance in this case that can confine the words to a *dying without issue at the time of Miss Dormer's death*; the cases which been cited are most properly applicable to this question.

I am of opinion, that though there are some words which this way, yet, in point of law, they will not admit of this construction.

Then, in the grammatical sense, is an adverb of time, but in limitations, a word of reference, and relates to the determination of the first limitation in the estate.

The word *then*, indeed, first occurred to me, but I do not collect any case that has turned upon this word merely, for in the grammatical sense, is an adverb of time (1), but in limitations of estates, and framing contingencies, it is a word of reference, and relates to the determination of the first limitation in estate where the contingency arises (2).

In the case of *Pinbury* versus *Elkin*, the words were, *i shall die without issue by the said testator, then after her death 80 l. shall remain to the testator's brother.*

Lord *Macclesfield* did not lay any stress upon the word but construed the words *after her decease*, in the same manner if it had been *at her decease*, and so relative to the death of the party.

And if the court here was to lay any stress upon the word it would be going a great deal too far, for it is too ambiguous to be taken as an adverb of time, and therefore in this case does not ascertain the point of time, but is merely relative to the determination of the limitation to *Miss Dormer*, and the contingency taking place.

With regard to *Lady Diana Beauclerk's* 5000 l. some plausible might be said, if this was to be construed as personal to her, and by way of provision as a portion, and to arise unless *Lady Diana* survived *Miss Dormer*, for then indeed, a strong argument might be drawn from thence to the testator's meaning was to confine the dying without issue to *Miss Dormer* to the time of her death.

But this being annexed by way of condition to the death of Lord *George*, makes it a vested legacy and transmissible, and not payable till a future time, which takes away all the argument that might be raised from its being personal to her only, and death before the contingency happens, will not defeat the legacy and so laid down in the case of *King* and *Wilbers*, *Cases in the time of Lord Talbot*, 117.

(1) See *Pinbury v. Elkin*, 1 P. W. 565.

(2) So *Biggs v. Benson*, 1 B. Rep. 190. *Benson v. Maadison*, Ch. Rep. 75. 77.

much as to the words of limitation and condition an-

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Chancellor then asked the counsel, who they understood *old woman in this will*; and they agreed on both sides that be *Betty Gibbs*, mentioned in the preceding words; then I take the 5000*l.* to be the only contingent legacy: but the old woman had been to arise upon the same continuation should have thought the words, *Miss Dormer to keep the in during her life*, would have shewn very plainly that the intention was, that this legacy and the preceding ones take place at *Miss Dormer's* death; but now I must construe 100*l.* to *Betty Gibbs* as a legacy payable immediately, it necessarily have the same construction with the legacies now: *videlicet*, to one servant his wearing apparel, and to his horses, which it would be absurd to say, must wait out of the defendant.

second question is, Whether a limitation over of personal after the death of the first taker without issue, generally, is void limitation.

been allowed that if taken so as to conclude issue *in in* then the limitation over is void as to real (1), but a distinction has been attempted as to personal chattels; this is the first time where it has been contended that a limitation over of personal thing, is to receive such a construction by the court as an a dying without issue at the death of the party, notwithstanding there are no words in the will that indicate this to be the testator's intention.

A limitation over of personal estate after the death of the first taker without issue generally is void.

first case of executory devises was *Matthew Manning's*, 8 afterwards came *Lampel's* case, 10 Co. 46. b. and several which were all on terms for years, and partook of the but the Judges had no notion of extending it to a per-

next was the Duke of *Norfolk's* case, *Select Caf. in Ch.* Lord *Nottingham's* first argument upon a contingent limitation of a personalty.

Courts of equity have gone further still, and have admitted the same limitations in personal, as in chattels real; but then they have declared at the same time that they will carry the limitation of a personal chattel, or trust of it, no further than the have done in a case of legal limitations of terms for

Courts of equity will carry the limitation of a personal chattel, or trust of it, no further than the Judges have done in the case of legal limitations of terms for years.

in versus Hutchinson is plainly different from this, though the counsel insisted the last contingency in that case is expressed generally as the contingency in the present; and taking it as a single independent sentence, it is an authority; but the words must be coupled together, and then the words, *if both die*

(1) *Vide Fearn Ex: Dev.* 322.

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v. DORMER.

without issue, must be construed in the same manner as the court had construed the former clause.*

Stanley versus Leigh 2 P. Wms. 636. has been cited.

I cannot think this an authority, because the question arose upon a limitation to the sons or daughters of the first taker which never took effect, as there was no issue at all.

According to Lord Hardwicke's note of *Forb and Chapman*, Lord Maclesfield held that the words, *leave no issue*, must relate to the time of the deaths of the testator's two nephews, *William and Walter*,

As to *Forb and Chapman*, I was counsel in it myself, and the note I took upon the back of my brief, it appears that *Mucclesfield* laid a good deal of weight upon the particular meaning of this will, if either of his nephews *William* or *Walter* should depart this life, and leave no issue of their respective bodies; these words, he said, must relate to the time of deaths, and it would be a forced construction to have extended to a dying without issue generally.

and could not be extended to a dying without issue generally.

The determination of the case of *Pinbury versus Elkin* is as I said before, upon the latter words, *after her decease*, were construed in the same sense as at or immediately after her decease.

In *Nichols versus Hooper*, 1 P. Wms. 198, the words were *paid within six months after the death of the survivor of the mother and son*, which confine it clearly to his dying without issue at the time of his death, and therefore does not come up in the present case.

The general argument that the sense of the words *dying out issue*, must, according to the common parlance, mean without issue at the time of his death, is only taken in as an auxiliary in arguing these sort of cases; and I do not know one in which the determination has turned singly upon this particular point.

In the case of *Kelly versus Rose*, before the committee 1723, I cited the case of *Target versus Gaunt*, for the same purpose as the counsel for the plaintiff do now. But *Master of the Rolls* said, *dying without issue* there is meant such as the first taker might have appointed, which must be in issue then living.

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On the part of the defendant several cases have been brought in to show two of them in point.

Milward versus Milward indeed has less weight, because it is not an exact account of it; but *Green versus Red* is a better authority in point: I was counsel in it, and took notes upon the brief of what the court said there. Lord Chancellor King delivered his opinion, that the main question in the cause was whether there were words in the will, to tie up the means of a dying without issue living at the time of her death; and he shews very plainly that he thought there could be no found-

* *Atkinson versus Hutchinson*, 3 Wms. 258. Devise of a term to *A.* for life, and then to the children *A.* shall leave at his death, and if the children of *A.* die without issue, then to *B.* The children of *A.* die without leaving any issue living at the time of their death. Lord Chancellor Talbot held this a good devise over to *B.*

for such a restriction, unless it was warranted by the words of the will.

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There are several other cases which might be cited, particularly the *Attorney General* in behalf of the Goldsmiths' company of *London*, versus *Hall*, before Lord Chancellor *King*, *Trin.* 5 *Geo.* 2. assisted by Sir *Joseph Jekyll* and Lord Chief Baron *Reynolds*. *Vide Fitzgibbon's Rep.* 314, 321, and *Vin. Abr.* tit. *Devise*, p. 103. pl. 50.

But I am of opinion that none of the authorities come up to support this point, contended for by the plaintiff's counsel, that *ex vi termini*, as this is a limitation of personal estate, it shall be confined to a dying without issue living at the time of the death of the first taker (1).

There is no authority can be produced where it has been held, that a limitation of personal estate shall be confined to a dying without issue living at the death of the first taker.

It would be of very mischievous consequence, and introduce great confusion, if the court should admit of a distinction between chattels personal and chattels real (2).

real and personal, it would introduce confusion.

The third question is, in what latitude and extent to consider this devise.

By calling Miss *Dormer* his sole heir, he gives her the whole real estate: and according to the opinion of Lord *Hale*, in *King* against *Melling* (3), "a devise to a man, and if he dies without issue, is always construed to make an entail; and if the devise be to *B.* and the issue of his body, having no issue at that time, it would an estate-tail; for the law will carry over the word *issue*, not only to his immediate issue, but to all that shall descend from him."

"The word *issue*, said Lord *Hale*, is *nomen collectivum*, and takes in the whole generation *ex vi termini*; and in all acts of parliament *exitus* is as comprehensive as heirs of the body (4), for where it speaks of the alienation of the donee, it is said *quo minus ad exitum remaneat*." By appointing her executrix Miss *Dormer* is equally intitled to the personal, as there is no legacy left to her.

What it is under this will that is to go to Lord *George Beaucherk*, whether one estate only, or both, is very uncertain; to apply the words to personal estate, which whether the testator himself has applied them to, *non constat*, would be going to far.

Indeed, the observation arising from the condition annexed, he to pay 5000*l.* &c. is very material to shew it must extend to

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(1) So *Saltern v. Saltern*, post. 376. *Stafford v. Butkley*, 2 *Vesf.* 181. *Attorney General v. Hind*, 1 *Bro. Cba. Rep.* 170. *Biggs v. Bensley*, 1 *Bro. Cba. Rep.* 188. *Glover v. Strothoff*, 2 *Bro. Cba. Rep.* 33. *Contra Nicholls v. Hooper*, 1 *P. W.* 199. *Target v. Gaunt*, 1 *P. W.* 432. *Pinbury Elkin*, 1 *P. W.* 565. *Pleydell v. Gydell*, 1 *P. W.* 748.

(2) See *Attorney General v. Bayley*, 2 *Bro. Cba. Rep.* 558. *Sed contra Forth v. Chapman*, 1 *P. W.* 665. *Pleydell v. Pleydell*, 1 *P. W.* 750. *Stafford v. Buckley*, 2 *Vesf.* 180.

(3) 1 *Vent.* 214. 225. *S. C.* vide *Bamfield v. Poibham*, 1 *Cox's P. W.* 54. and notes.

(4) *Post.* 582.

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both; and then supposing the real estate had not been bar- and Miss *Dormer* had died, leaving Lord *George* the 5000*l* would have been a charge upon the real, as well as the perso.

Upon the whole, I do not think the construction conten- for on the behalf of the plaintiff, is supported by any case w- ever; and therefore, as the words of this will are general, : unrestrained, the limitation over must be void, and cannot confined to the defendant's dying without issue living at the ti of her decease, and therefore the plaintiff's bill in this cause n be dismissed.

Ex parte Howard
3 Bro. P. C. 212. 814
Case 223.

Ex parte Whitfield, June 17, 1742 (1).

The court, upon *ex parte* applica- tions, may allow maintenance for an infant, where no cause is de- pending. It is at the peril of a guardian in so- cage, what he applies for maintenance.

WHEN this petition was formerly heard, I had a de- whether the court could, upon *ex parte* applica- allow a maintenance for an infant, where no cause is depend for it is at the peril of a guardian in so-cage, what he app- for maintenance, and he will be allowed according to the cretion he has used, and therefore I directed it to stand over precedents.

Ex parte Chambers
Kings. C. M. 577.
In re M. Bullen
1 Drury. 276

Two have been left with me, in cases which came before late Master of the Rolls, Sir *Joseph Jekyll*, July 26, 1731 *Ex parte Odel*, a petition for a guardian, maintenance, and a rece- and there was no cause depending before the court, and ye court directed according to the prayer of the petition.

This order seems to go too far in appointing a receiver.

The court has not a jurisdiction to appoint a receiver, unless a cause be depend- ing. The jurisdic- tion the court exercises as to ideots and lun- ticks, is a parti- cular one.

For, supposing the court, as a proper incident for a guar- should direct a Master to see what is necessary for mainten- yet the court has not a jurisdiction to appoint a receiver, u a cause was depending (2); the case of ideots and lunatick been insisted on as a similar case, but the jurisdiction whic- court exercises with respect to them, is a particular one, therefore not like the present.

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The second precedent was on *August 14, 1734, ex parte F before Sir Joseph Jekyll*, it was a petition to appoint a guar- and for maintenance, and the court directed accordingly.

I have been looking into cases, and find one in point, *Tenham versus Barret* (3); there was a petition to Lord *Ma- field* in *December 1723*, and afterwards went upon an appe- the House of Lords, *April 16, 1724*, there Lady *Tenham* mother of the infant, was a papist; the young gentleman intitled to two great estates, and to a barony in fee, and ther

(1) *Reg. Lib. B. 1741. fol. 391. Vide ex parte Thomas, Amb. 146. Ex parte Kert, 3 Bro. Cha. Ca. 88. Ex parte Salter, 3 Bro. Cha. Rep. 500. in which last case all the authorities here men-*

tioned by Lord Hardwicke were exam- with the Register's book.

(2) *Anon, ante 1 vol. 489.*

(3) *2 Bro. P. C. 539.*

incumbent upon the court to take care of his education, that he might be brought up a protestant.

Ex parte
WHITFIELD.

The grandfather of the infant was named by the court, but being very old, and refusing to accept of it, Mr. Serjeant *Baynes* as recommended by him, was appointed guardian; and it was further directed, that a Master should examine what Lady *Tenham* would allow for maintenance, and whether her offer would be suitable to his rank; she appealed from this order to the House of Lords, and insisted upon the guardianship; after long debate, they confirmed Lord *Macclesfield's* order, except with this variation, that, instead of Serjeant *Baynes* being guardian, the grandfather should be appointed, because a stranger was not so proper to be trusted with it: It came before the House of Lords likewise upon the order made on the Master's report, where he had reported 200 *l. per ann.* as proper for maintenance; and the Lords confirmed Lord *Macclesfield's* order in this respect likewise.

So here is a precedent in point, where maintenance has been allowed upon the authority of Lord *Macclesfield* and the House of Lords, notwithstanding there was no cause depending.

There may be a great convenience in applications of this kind, because it may be a sort of check upon infants, with regard to their behaviour, and it may be an inducement to persons of worth to accept of the guardianship, when they have the sanction of this court for any thing they do on account of maintenance, which otherwise would be at their own peril; and likewise of use in saving the expence of a suit to an infant's estate.

The convenience in these applications is, the inducement to persons of worth to accept of the guardianship, where they have the sanction of this court for every thing they do on account of maintenance.

Woodcraft versus Kinaston, June 21, 1742.

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Case 224.

A Motion was made at the last seal to quash or supersede a writ of *certiorari*, which issued out of this court, to remove a plaint of replevin in the mayor's court of the city of London.

Where the tenor of a record, instead of the record itself, is removed by *certiorari* out of an inferior court, it is erroneous, as no proceedings can be had upon it.

certiorari out of an inferior court, it is erroneous, as no proceedings can be had upon it.

The writ was directed to the mayor and sheriffs of London: "We, willing, for certain causes, to be certified upon the tenor and record of the process of a certain plaint, what was before you in your court, without our writ, between *George Woodcraft* gentleman, and *Andrew Kinaston*, of the goods and chattels of the said *George*, unjustly taken, and detained, as it is said, do command you, that distinctly and plainly you send the tenor of the record, and process, of the said plaint, with all things touching the same, by whatsoever names the parties in the said plaint are called, under your seal to us in our Chancery, from the day of *Easter*, in fifteen days next, ensuing, wheresoever it shall then be, and this writ. Witness ourself at *Westminster*, February 19, in the 15th year of our reign."

Foot o. Collins
W. de Baig. 2

WOSPICRAFT
v. KINASTON.

Mr. Caldecot objected at the last seal, that this writ was bad because the tenor of the record is only directed to be removed and not the record itself.

Where a replevin is in a court of record, you may remove it by a *certiorari*, either from the court of King's Bench, or from this court.

Lord Chancellor, having taken time to consider it, said, when a replevin is in a court of record, you may remove it by *certiorari* issuing either out of the court of King's Bench, or this court *Thessau. Brev. 77. R. N. B. 554. 4to edit.*

As to the exception, that it is not to remove the record and process, but the tenor, I think the writ is erroneous for this reason.

There is a great difference between the record itself, and the tenor, for this is only a transcript or copy, indeed it must be literal, but still it is only a transcript; and as this is a *certiorari* to remove a record out of an inferior court, in order to be proceeded upon in a superior court, it ought to be the very record, for otherwise, no proceeding can be had upon it.

A *habeas corpus* and a *certiorari* differ, that removes the body *cum causa*, and you declare *de novo* in the superior court.

There is a difference between a *habeas corpus* and a *certiorari*, that removes the body *cum causa*, and then you must begin in the superior court, and declare *de novo*; but on a *certiorari* you must proceed on the record, as it stands when removed.

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Where a *certiorari* issues in order only to use the record as evidence, then the tenor, if returned, is sufficient, and countervails the plea of *nul tiel record*; but when the record itself is to be proceeded upon, the record must be returned.

There is another difference between *certioraries* themselves this present writ was framed, I believe, from *certioraries* brought for another purpose, for the precedents found in the Curstons' book, which I looked into, are such, and they are in order only to use the record as evidence, for if *nul tiel record* be pleaded, the court cannot have the record but by *certiorari*, and then the tenor, if returned, is sufficient, as evidence of the record, and will countervail the plea of *nul tiel record*; but when the record is to be proceeded upon, the record itself must be returned. *F. N. B. 548. in the notes (a) Register 288, b.*

Whether it be before judgment, or after, makes no difference, in both cases the record itself must be removed.

There is no difference when the proceeding upon the record is to be removed, whether it be before judgment or after, in both cases the record itself must be removed; if it was not so, this consequence would follow, that by sending for the tenor of the record the inferior court would be tied up, and yet the superior court could not proceed. *Salk. 147 & 565.**

* *Domina Regina versus Parech' St. Mary's in the Devises, Pasch. 1 Ann. B. R. S. 147.* On a *certiorari* to return an order, it was returned, *cujus quidem tenor sequitur hæc verba* and it was quashed for this reason.

Dominus Rex versus North, Hil. 8 W. 3. B. R. Salk. 565. per Holt Ch. J. It is error in the clerks in London, that upon a *certiorari* they return only a transcript, and the record remained below; for in C. B. though they do not return the very individual record, yet the transcript is returned as if it were the record, and so it is in judgment at law.

From

From these authorities, I think this certificate is erroneous, WOODCRAFT v. KINASTON. and if I send it to the Common Pleas by *mittimus*, this exception might be taken there, and give great delay.

The question then is, Whether I ought to quash or supersede this writ?

And I am of opinion, that I cannot quash it, but must supersede it (1), for I cannot quash but on a view of the record itself, and so must wait for the return.

The court may supersede a certificate, but cannot quash it without a view of the record.

This came in question in the great case of Sir *Joseph Sharp*, and the mayor, aldermen, and commonalty of *London*, in the latter end of *Queen Ann's* time. in the court of King's Bench.

A *mandamus* issued to them by corporate names, and, before the return, it was moved to quash it, because misdirected, for that it ought to have been to the mayor and aldermen only; this was argued, and the judges differed in opinion; but Mr. Justice *Eyre* took an objection, that the court could not quash the writ, because it was not before them, as not being returned, and that it must be a *supersedeas* only.

And the whole court were unanimously of that opinion, in this respect, though they disagreed in other points. [319]

Let the writ be superseded, and a *procedendo* awarded.

(1) *Vide Ogver v. Heywood, Amb. 59. Weavers' Company v. Haywood, post. 3 vol. 363.*

Richards versus Symes, June 26, 1742.

Case 225.

THE question was, whether there are grounds enough for a new trial? S. C. Barn. Cha. 50.

not grant a new trial upon a suggestion that the party was not apprized of a particular evidence, and therefore not prepared to give an answer. The court will

The fact to be tried in the cause was, whether Mr. *George Richards* gave the mortgage in question to the defendant in equity. *Stifford v. Waller*
H. 1742.

Upon the trial, in order to discredit the evidence of one *Bere*, the most material witness for the defendant in equity, the plaintiff brought a person to swear, that this witness for the defendant was not in *England* at the time he swore to the fact.

Several affidavits were read, upon the motion, on the behalf of the defendant in equity, to prove that *Bere* was actually in *England* at the time he swore to the fact.

It was insisted therefore, by his counsel, that the credit of *Bere* being invalidated, as has been mentioned, weighed greatly with the jury, and was the principal reason that induced them to give the verdict for the plaintiff in equity.

It was insisted likewise, that the defendant in equity was not prepared to do any more than to support the general character of his witnesses, or otherwise could have given the same answer he is able to do now, if he had been aware of the objection.

LORD

RICHARDS v.
SYMES.

LORD CHANCELLOR,

This is an application for a new trial, which comes before the court after a considerable length of time, as the verdict was given in *November* last.

The ground for the new trial is, that the defendant in the court was surprized with evidence he was not aware of, and that he was not prepared to answer it (1).

A great many objections have been made to this motion, both upon general and particular reasons.

The first objection, That this is an application for a new trial, after a verdict found by a special jury upon a trial at bar.

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A distinction was taken formerly between trials at bar, and at *nisi prius*; but in the case of the *Queen and The Bailiffs and Burgeses of Bewdley*, eleven judges against one determined a new trial ought to be granted.

I do agree, that formerly some countenance has been shewn to this objection, and a distinction taken between trials at bar and at *nisi prius*, because the latter are subordinate to the other, and therefore not of so solemn a nature (2).

In the case of the *Queen and The Bailiffs and Burgeses of Bewdley*, eleven judges against one determined a new trial ought to be granted.

But this point was solemnly considered upon the case of the *Queen and The Bailiffs and Burgeses of Bewdley*, 1 P. Wms. 207 where eleven judges, against the single opinion of Mr. Justice John Powell, determined that a new trial ought to be granted.

Another general objection was, that it is contrary to the rule in courts of common law.

For it was said, they never grant a new trial there for want of the attendance of witnesses, or of a party's not being ready.

The reason is plain, because the issue there is barely drawn out upon the fact which is to be tried, and it is impossible to tell whether a jury found a verdict upon the merits, or upon a discrediting of witnesses; and courts at common law might set aside a verdict nine times in ten, if it should be a ground for a new trial, that one of the parties was not apprized of the evidence on the other side (3).

The intent of directing issues here, is only to inform the conscience of the court, and therefore not tied down to the same strictness of verdicts as courts of common law.

But then it is said, and materially too, that there is a difference between issues at common law, and issues directed by this court, because the intent of it here is only to inform the conscience of the court, and therefore not tied down to the same strictness and regard for verdicts as courts of common law.

A notice to the defendant before the trial, that the plaintiff will prove a person to be abroad, though it does not point out the particular place where, is sufficient for the defendant to be prepared to encounter this evidence.

But in the present case, there are no grounds for a new trial. The person who makes an affidavit on behalf of the defendant in equity, swears, that he gave *Richards* notice a fortnight before the trial, that they would on the other side attempt to prove

(1) *Vide* *Hennell v. Kelland*, 1 Eq. Ab. 377. pl. 2. *Codrington v. Webb*, 2 Vern. 240. *Humphries v. Payton*, cited *Prec. Ch.* 194. *Stace v. Mablett*, 2 Ves. 553.

(2) *Vide* *Attorney General v. Montagu*, post. 378. *Baker v. Hunt*, 1 P. Wms. 28.

(3) 2 Ves. 553.

Bere abroad, which though it was not so particular as to point out the very place where they would shew him to be, yet was sufficient notice for *Richards* to prepare to encounter this evidence.

RICHARDS v.
SYMES.

The case of the *Attorney General* versus *Montgomery* (1) has been mentioned, in which I granted a new trial, but upon very different reasons from the present.

I was then aware of the inconvenience which might arise from granting new trials, upon the discovery of new evidence relating to the same fact: But what I placed the chief weight upon was, that the evidence there was in the hands of the relators themselves, and there was no kind of danger of perjury, and therefore can be no precedent in the present case.

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There is another reason that weighs with me, that the new trial is prayed on behalf of the plaintiff at law, and if it had been better made out, I should not have inclined to grant it, because it was in his power to have been nonsuited; for if his counsel had been of opinion that there was evidence that they were not apprized of, and too strong for them to encounter, they might have advised him to suffer a nonsuit, and then he might have come back to this court for new directions, who would have ordered another issue at law notwithstanding the nonsuit.

Upon the whole there are no grounds for a new trial, and of extreme dangerous consequence, to grant it merely upon a suggestion, that the party was not apprized of this evidence, and therefore was not prepared to give an answer (2).

(1) *Poft.* 378. S. C. (2) *Tovey v. Young*, *Pres. Cba.* 193.

Richards versus *Baker and others*, June 26, 1742 (1)

Case 226.

THE question in this cause arose upon the words of Mr. *John Richards's* will, dated *August* 10, 1736, and came on upon an appeal from the *Rolls*.

The question was, Whether the words in a will, so long as my wife continues

a widow, and no longer, are to be confined to the testator's house at *Edmonton*, or to be extended to the whole that was devised to her: *Lord Hardwicke* held, that the household goods, furniture, plate, linen, and china, were put under the same restriction as the house itself; but that the jewels, coach, chariot, and coach-horses, were the wife's absolute property.

Richardson v. Lord
S. Hylton &c
1745.

The testator gave two thousand pounds to his wife *Dorothy Richards*, to be paid in six months after his decease; and then says, I do also give and bequeath unto my dear and loving wife, all my household goods, furniture, plate, linen and china, in my house at *Edmonton*, wherein I now dwell, or to the said house belonging; and also the said house, gardens, field and land thereto belonging, so long as she continues my widow, and no longer: And I likewise give her my jewels, coach, chariot, and coach-horses; and the testator gave the residue of his personal estate to

Hobbs & Grace
J. Phillips

Child
Stewart

J. D. Gay. M.
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(1) *Reg. Lib. B.* 1741. fol. 340.

the

RICHARDS v. BAKER. the child his wife was then enceint with, if a son, and appoint him executor of his will.

This cause was heard before the *Master of the Rolls*, on 23d of December 1737, who decreed, that the defendant *thy Richards* should leave with the Master, a schedule of several things specifically bequeathed to her during her widowhood (1).

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It was insisted by the counsel for the testator's widow, that condition of her marrying again, is to be confined to the part of the legacy, which ends with the words *his house at Edmonton*; and that the words *and also the said house, gardens, together with my jewels*, &c. is an absolute devise to the widow and that she has the whole property in them, and not subject to the condition; and as the words, *so long as she continues a widow* are interlined between the first clause, they shall be confined that only, and the others are absolute legacies.

The counsel for the defendant insisted it is one intire condition and must be taken together, and then the condition extends to the whole; and relied upon *Roll's Abr.* 844. *Tit. estate pur autre vie*, s. 3. and upon the case of *Leake versus Bennet*, *Atkyns's Rep.* 470.

The Attorney General, in reply, insisted the testator did not have his son much in his contemplation, because he was not born till after his death, and it was uncertain what the son would be, whether a son or a daughter, and therefore there was great weight to be laid on his affection to the son.

LORD CHANCELLOR,

The question comes before me upon the construction of the will of Mr. *Richards*; the two thousand pounds is an absolute legacy to his wife; but I am to determine what is the relation and extent of the words of limitation *so long as she continues a widow, and no longer*, whether they are to be confined to the part at *Edmonton*, or to be extended to the whole.

I cannot be of opinion that the words should be so restrained, but not to extend to the household goods, &c.

In the first place, it is a natural construction, for when the testator gives her the household goods, &c. it is not a general devise of them, and when he gave her too the house in the country it was extremely natural to put the goods, &c. under the same restriction as the house itself; the words directly pursue their natural meaning, for they both fall under the same devising words, give and bequeath, and likewise too under the designation of donee, for they are part of the same sentence. *Vide the case Cole versus Rawlinson*, 1 *Salk.* 234. where the words are held to make it one intire sentence (2).

This case is much stronger, for the words of limitation follow both the devise of the household goods, &c. and the devise

The putting
limiting words
in the first or
last part of a
sentence, makes no difference as to the construction.

(1) *Vide Bill v. Kinaston*, ante 82. (2) *Vide 8 Vin. Ab.* 215. and cases there cited.

house, and the putting limiting words in the first or last of the sentence makes no difference.

RICHARDS v.
BARKER.

As to the observation from the interlineation, and the inference drawn from thence, as if this was a new intention of the testator, for the will was written complete, and that he afterwards bethought himself, he would give her the house for life; it is too uncertain a suggestion, and I cannot infer that this is an intention by way of new devise, for possibly it might be error in the copier, and restored only by the testator himself, the words *belonging* coming so near together might lead the scribe into a slip of one line, and there are frequent instances in *Greek* and *Latin* manuscripts, where this slip has happened from the same words standing too near together, and therefore I am of opinion, the widow has no title to the household goods, &c. nor house, garden, &c. any longer than her widowhood.

As to the clause of the devise of the *jewels, coach, chariot, and coach-horses*, it is of a different consideration.

For I may give one thing to a person for life, together with absolute property in another, unless the latter should be appurtenant and appendant to the thing before given; but here the things are of a quite different nature, and have no manner of relation to the house and gardens.

A testator may give one thing to a person for life, together with an absolute property in another, unless the latter should be

appurtenant to the thing before given.

And if Mr. *Faulkner's* observation was just, that the words of limitation were inserted upon a new intention, then being placed before the devise of jewels, &c. are an indication of the testator's intention to exclude these last words, and if they had not been excluded, I should still have been of the same opinion, because the limiting words would have been more naturally placed at the end of the whole devise to the wife, together with jewels, so long as she continues a widow, and no longer.

But whether I am right or not in this construction, there can be no great harm in permitting the mother to keep these things in her possession, till her son, who is an infant of very tender years, comes of age.

Lord Hardwicke ordered, "that the decree of the *Rolls* be varied, by leaving out the clause mentioned already at the beginning of the case; and declared, that the defendant *Dorothy Barker* (late *Dorothy Richards*) is intitled to the absolute property of the jewels, coach, chariot, and coach-horses, given to her by the will of Mr. *John Richards*, but that she was intitled only to the use of the testator's household goods, furniture, plate, linen, and china, in his house at *Edmonton*, wherein he dwelt, to the house belonging, during her widowhood: And ordered and decreed, that the defendant *Dorothy*, and *Samuel Barker* her husband, do cause the same to be delivered over to the testator's executors."

Case 227.

*Bennet versus Wade and others, June 28, 1742 (1).*S. C. post. 487.
529.The plaintiff, as
heir at law to
Sir John Lee,
brought a bill to

to set aside a conveyance of the estate of the defendant, on a suggestion of fraud, imposition, and influence: Lord Hardwicke held, the plaintiff ought to be relieved, and decreed the deed so delivered, and possession of the estate likewise given to him (2).

*Widdicombe v. Hardwicke**1 W. & A. 358.*

LORD CHANCELLOR,

I am of opinion the plaintiff in the original bill ought relieved.

Settled ever
since the case of
Powis and Andrews, that a
will cannot be
set aside for fraud
here, because
where it is a will
of personal
estate, it may be
done in the ec-
clesiastical court,
and of real estate,
at law.The principal question must arise upon the original bill far as the bill seeks to set aside the will it is improper, so court cannot make a decree of this kind, but only direct an *advisavit vel non*; for it is settled, ever since the case of *Lee and Andrews* (3), upon an appeal from Lord Macclesfield's decree, February 6, 1723, to the House of Lords, that a will not be set aside for fraud and imposition here, because a will of personal estate may be set aside in the ecclesiastical court (4), and of real estate, at law (5); and the reason is, the *animus testandi*, which is essential to the making of a will wanting in this case, and therefore cannot be considered will at all.

But the recovery here has very luckily relieved the court this part of the case; for by the over diligence and assiduity the defendant he has defeated himself, which is a very common case, and is the interposition of Providence, to prevent the consequences of fraud.

Where the ten-
nant in a com-
mon recovery
has not pleaded
non-tenure, he
gains a new
estate, though
the limitations are to the old uses, and the will is revoked by it.Sir John Lee, the tenant, has not pleaded non-tenure, therefore he gained a new estate, though the limitations are to the old uses (6), and the will is revoked by it (7). *Vide* Lord Justice Holt's argument upon this point, in the case of *Page v. Hayward*, *Salk.* 570.(1) *Reg. Lib. A.* 1741. fol. 515.(2) *Vide* *White v. Small*, 2 *Ch. Ca.* 103. *Clarkson v. Hamsey*, 2 *P. W.* 203. *James v. Graves*, 2 *P. W.* 270. *Bridgman v. Green*, 2 *Ves.* 627. *Evans v. Blead*, 4 *Bro. Par. Ca.* 557. *Filmer v. Gott*, 7 *Ero. P. C.* 70.(3) 2 *Bro. P. C.* 476.(4) *Archer v. Mefs.* 2 *Fern. 8. Thwaitse v. Smith*, 1 *P. W.* 12. *Phyne v. Beale*, 1 *P. W.* 388. *Tucker v. Phipps*, *post.* 3 vol. 360. *Stifford v. Dutches* 9 *Buck-**inghamshire*, ante 1 vol. 630. *Marr. Marlett*, 1 *Str.* 666.(5) *Gos v. Tracy*, 1 *P. W.* *Barnes v. Powell*, 1 *Ves.* 120. *Webb v. Chawerton*, *post.* 424.(6) *Vide* *Tingenwell v. Strachan*, 2 1179. 5 *Darn. & East* 107. 1 *Broughton*, 3 *Bro. Ch. Rep.* 180. *v. Piddewere*, 5 *Darn. & East* 104.(7) *Vide* *Burdett v. Baughton*, 273. *Hick v. Mers*, *Ambl.* 215.

It has been objected that the bill charges insanity in Sir John Lee, and at the same time his counsel put it intirely upon his weaknefs.

BENNET V.
VADE.

The plaintiff, to be sure, was right in coming here upon the head of fraud and imposition, to have the deeds delivered up to be cancelled (1), and for that reason, proper in amending his bill, and charging fraud in order to set aside the deeds, or if the court should be of opinion that it is merely a matter triable at law, then they might dismiss it to law; nor is there any thing irregular in a person's bringing a bill with two different aspects, that if one fails, the other may as effectually answer the purpose for which the bill was brought (2).

A person may bring a bill with two different aspects, that if one fails the other may as effectually answer the purpose for which the bill was brought.

I shall take it for granted, that Sir John Lee's disorder is neither idiotism nor lunacy, from the inquisition in 1733, but still I think this is rather evidence for the plaintiff than the defendant.

The boundary is so narrow and streight between a person who is *non compos mentis*, and who is so weak as Sir John Lee appears to have been, that it ought not to overturn the plaintiff's equity, because some of his witnesses go so far as to give such instances as amount to lunacy or idiotism.

There cannot be a greater instance of weaknefs, than the caution Mr. Onslow thought himself obliged to give Sir John Lee, which was to avoid signing any writing or paper whatsoever; it is like a nurse warning a child not to go near water for fear of being drowned.

It is proved that he was addicted to drinking likewise, which added to his natural disability.

It is argued by the witnesses on both sides, he was almost dark, that one eye was intirely gone, and but a small glimmering of light from the other.

Another great instance of weaknefs is proved in this cause, that they married him without his so much as knowing that he was so, or even without the decency of making a previous proposal to him, and I think this is one of the strongest marks of weaknefs, and liableness to imposition, that ever I met with.

Sir John Lee's repeating scraps of *Latin*, and reading the *Classic* authors, is no proof of his sanity, because what a person learns in his youth leaves a lasting impression, and the traces of it are never intirely worn out, and therefore I lay no weight upon it; and though I do not say the inquisition upon the commission of lunacy have done wrong in finding him no lunatick on circumstances laid before them; yet I think I am as right in determining him to be a weak man, upon the circumstances which are laid before me.

The second consideration is, the strong proofs likewise of the defendant's power and influence over Sir John Lee; there is one remarkable instance of his standing in awe of *Vade*; that, whenever he was outrageous, the bare name of *Vade* would quiet him, as a nurse does a child.

Lancaster
Smith
2. Beane
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Beadle
Birch
10. Stone
332.
Allen
St. Pherson
1. Chas. & Fr.
N.S. 191
Bellamy
Sabine
L. Phillips

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(1) *Herbert v. Lewis*, 1 *Cha. Rep.* 22. (2) See *Grimes v. French*, ante 141.

BENNET V.
VADE.

The third consideration is, as to the deeds: Sir *John Lee* died *January* 27th, 1736; the settlement of the whole estate upon *Vade*, by way of lease and release, was dated the 9th and 10th of the *December* before, with two very extraordinary provisions; first, to restrain Sir *John Lee*, during his life, from taking any fine or leasing, without reserving the full rent; and secondly, the power of revocation, which is so expressed, as that the deed is not to be revoked by Sir *John*, but in the presence of three particular persons therein named, or of their executors or administrators.

By this settlement, Sir *John Lee* is made to disinherit his heir at law absolutely, and give his estate away from his next of kin, to *Vade* and others, who are no relations, for whom he never had declared any kindness, so as to create an apprehension that he intended to give them his estate, nor had they done any thing to merit it at his hands: here is a voluntary settlement, and the grantor himself so fettered, that he is not able to raise one shilling, and as much confined as if it had been a marriage settlement for a valuable consideration.

As to the power of revocation, the most extraordinary I ever saw; for the drawers of this deed foresaw, if there had been no such power, it would have been almost of itself a reason to have set the deed aside, and therefore, for form sake, have inserted one; but there is no proof that Sir *John Lee* directed this particular revocation; there is no proof that he was acquainted with any one of the gentlemen named in the deed; and how could Sir *John Lee* have got them all together upon any sudden illness, who lived at distances from one another, or how could he force them to come if they should refuse?

A will would have disposed of the whole as well as this conveyance; but, in order to secure it effectually, the defendant *Vade* thought this method better, for fear Sir *John Lee* might be got out of their hands, and make a new will.

The case of the Duke of *Albemarle* (1) was quite different from the present; before he set out for his government at *Jamaica*, a deed was prepared by his direction, and signed by Sir *William Jones*, who perused it at his request, and the power of revocation there was in the presence of any six peers, not tied down to particular persons; is this at all like the present, where there were no previous instructions from Sir *John Lee*, no perusal of counsel on his behalf, and a power of revocation limited to three persons by name, and almost impracticable to be performed?

Next, as to the execution of it; the deed is not proved to be so much as read to Sir *John Lee* in the rough draft before the execution (2), nor in the engrossment at the time it was executed, but one part executed, and not left with Sir *John Lee*, or any body for him; then how could he remember the power of revocation? and therefore *Vade's* taking away the deed thus executed, amounts, in effect, to the same thing as if it had

Not reading a deed to a person in the rough draft before the execution, nor in the engrossment at the time it was executed, is a badge of fraud,

(1) 2 Freem. 193. S. C.

(2) Vide *Manley's case*, 2 Co. 3. a. b. *Thorogood's case*, 2 Co. 9. a. b.

n absolute conveyance, without any power of *revocation* at BENNET V.
VADE.

the conveyances were executed after *Vade* had got an influence over him; for, besides this deed, the attorney rew it, *Wildman*, has an annuity to himself and his wife *l. per ann.* during their joint lives, and to the survivor; ad no merit as to Sir *John Lee*, but was only hush money *Vade*, besides annuities of 30*l.* to two other persons. *Vide* se of *Standard v. Lee*, which went up to the House of

said by the defendant's counsel, that if Sir *John Lee* was sane, but only weak, he might do an act that will bind

l very rightly observed, for there cannot, as is truly said, The rules of
o rules of judging, in law, and in this court, upon the judging here and
of insanity. at law in cases of
infanity are the
same.

e only part that deserves to be considered, is the plain in-
a Sir *John Lee* had to disinherit his heir; but then it will
d upon this question. Whether this too was not owing to
wer and undue influence *Vade* had over him, and the fre-
opportunities they took of incensing Sir *John Lee* against
ir, upon account of the inquisition of lunacy?

efore, supposing he had a real intention of disinheriting
eir at law, if it was owing to fraud and imposition, this
etch back and revest it in the heir; and if the settlement
of the case, no body can have it but the heir; and this
led by variety of cases. It comes nearest to the case of
and *Stanhope*, which went up to the House of Peers *May* 27,
The power of imposition in that case was not the tenth
so strong as in the present.

Though a person
has an intention
to disinherit his
heir, yet, if it
was owing to
fraud, this will
fetch back and
revest it in the
heir.

[*328]

ie provision for creditors is a very honest one; and therefore
l direct the trustees for this purpose under the settlement to
y to the plaintiff, with a saving of the interest of Sir *John*
creditors, if any should hereafter appear.

ie deed was decreed to be delivered up to the plaintiff, and
fession of the estate likewise to be given to him immediately,
Vade ordered to pay costs.

s to *Wildman*, I would not have it laid down as a rule, that
torney or solicitor, who draws deeds under fraudulent cir-
stances, shall afterwards, to save costs, excuse himself in
t by saying that he could only follow directions, and there-
is not to be involved in the blame of the transaction; but
, there is an additional circumstance of the annuity to him-
and his wife, which puts it out of all doubt that he ought to
costs; and ordered accordingly.

An attorney's
saying that he
only followed
directions in
drawing deeds
under fraudulent
circumstances,
will not excuse
him from paying
costs.

Case 228.

Attorney General versus Bucknall, June 23, 1741 (1).

LORD CHANCELLOR,

Any persons, tho' the most remote in the contemplation of the charity, may be relators in an information.

It is not absolutely necessary that relators in an information for a charity, should be the persons principally interested, for the court will take care at the hearing to decree in such a manner as will best answer the purposes of the charity; and therefore any persons, though the most remote in the contemplation of the charity, may be relators in these cases (2).

It is doubtful in this case, whether the donor of this charity intended the capital sum to be disposed of for the purpose in the information mentioned, or only the interest and produce of it.

I do not know any instance where this court, in any case of charity whatsoever have taken to themselves such an arbitrary disposition, as to confine it to a gift of the interest and produce only, when there is no more certainty of the donor's giving the capital than the interest, but is left quite obscure, and in the dark.

The Master directed to inquire who come under the description of the donor, as proper objects of charity.

(1) *Mr. Ward*, in his life-time, gave 4600*l.* *South Sea* bonds, to *Mr. Biscope*, (who was also a legatee under his will) and thereupon made the following memorandum in his waste book. "10th January, 1716, profit and loss. Debtor to 4600*l.* *South Sea* bonds given to "Mr. *Samuel Biscope*, to dispose of according to my directions to him" *Ward* died, and also *Biscope*, who made his sister *Bucknall* executrix. After *Biscope*'s death, a letter was found directed to his sister, wherein he acknowledges that this sum of 4600*l.* *South Sea* bonds, was given to him to assist *Ward*'s poor relations; and begs her to accept

of the trust after his death, and out of the interest and produce thereof, he begs her chiefly to assist certain persons therein mentioned. The information was brought at the relation of one of *Ward*'s poor relations. Decreed, that the gift of 4600*l.* *South Sea* bonds, was a gift of the principal and interest of that fund for the benefit of *Ward*'s poor relations. An inquiry was directed as to the object of the charity. *Reg. Lib. A. 1741. fol. 636.*

(2) But it seems necessary that there should be a relator, who has some interest. *Misford 90, 91. Attorney General v. Ogdenaer, 1746. jun. 246.*

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Case 229.*Haughton versus Harrison, June 31, 1742.*

T. H. gives 500*l.* by his will to be paid to his grandson *T. P.* if he lived to be 21, and in case he died before, then to the other child or children of his daughter

M. P. equally, arriving to such an age. *T. P.* died before 21, and no child of *M. P.* was born or living at the testator's death. The grand-children born after the death of *T. H.* were intitled to the 500*l.* for not being in esse in his life-time, he must have had in his view the future children of his daughter.

A Question arose upon the will of *Thomas Haughton*, dated the 14th of October 1738. "He gives a legacy of 500*l.* to be paid to his grandson, *Thomas Price*, the son of *Mary Price*, if he lived to be twenty-one, and in case he should die before, then to the other child or children of his daughter, equally, arriving to such age." And after some small legacies gave all the rest and residue of his personal estate to the plaintiff,

and

and died the 18th of October, 1738, and since his death, *Thomas Price*, his grandson, died under the age of twenty-one years, and there being no child or children of *Mary Price* born or living at the testator's death, the plaintiff insisted *the five hundred pounds* ought not to be raised, but sink into the residuum of the testator's estate for the plaintiff's benefit.

HAUGHTON v. HARRISON.

*Leshie v Leshie
1 Lloyd & Grot.*

It was insisted likewise by the counsel for the plaintiff, the heir at law, and only son of the testator, that the latter legacy to the child or children of *Mrs. Price* is equally contingent with the legacy to *Thomas Price*, and must wait till they arrive at their age of twenty-one, and therefore does not carry any interest in the mean time.

The counsel for the defendants, *Mary Price* and *Pindock Price*, the brother and sister of *Thomas Price*, insisted that the testator, in a case of *Thomas Price's* death before 21, gave the *five hundred pounds* to the other child or children of his daughter equally, arriving to such age, and that *Mary Price* and *Pindock Price* are intitled thereto, though not born till after the testator's death; and that the words, *if Thomas Price lived to be twenty-one*, must be taken in the same sense as the words, *so soon as he attained his age* 21, would have been, and therefore not contingent as to the payment; and that as it is one entire sentence, the latter part by relation will equally carry interest to the other child or children of *Mrs. Price*, as to *Thomas Price*.

LORD CHANCELLOR,

It is plain the grandchildren born after the testator's death are intitled, for as they were not *in esse* in his life-time, the testator must have had in his view future children of his daughter (1): and I am of opinion they are not entitled to interest, tho' I would oblige them if I possibly could.

If this legacy had been left upon no condition but to be paid to *Thomas Price* at his age of twenty-one, and not given over, when it would have been a legacy vested, and transmissible; but when no interest could have been demanded, unless it be in the case of a child, who had no other maintenance or provision, for a parent is bound by nature to support a child; but this has not been carried so far as the case of grandchildren (2).

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A parent is bound by nature to support a child; but this has not been extended to grandchildren, and therefore not intitled to interest.

But here it is still stronger, for this is not a vested legacy; and in case *Thomas* died before twenty-one, it is given over.

The words, *equally arriving at the age of twenty-one*, must be construed agreeable to the other words, and therefore it will still remain a doubt, whether any thing vests till twenty-one: but I will not determine this now, and will only direct the *five hundred pounds* to be put out to interest (3), and to be paid in the mean time to the plaintiff; and if the child or children of *Mrs. Price* arrive at their ages of twenty-one, then the principal sum of *five hundred pounds* to be paid to them, and interest from the time it becomes payable.

If the child or children of *Mary Price* arrive at 21, then the 500*l.* was directed to be paid to them, and interest from the time it becomes payable.

(1) *Heatbe v. Heatbe*, ante 122. note 2. (3) *Heath v. Perry*, post. 3 vol. 105.

(2) See *Heath v. Perry*, post. 3 vol. note

Case 230.

Thornhill versus Evans, July 2, 1742.

A mortgagee, where the mortgage was only four and half per cent. compelled the mortgagor to turn the interest into principal at five per cent. at the end of every six months, and at the time the mortgage was

paid off, insisted on an advance of six month's interest, over and above the interest which The bill was brought for relief against the mortgagee, and to set aside the grant to the defendant the place of steward to a manor of the plaintiff's, as obtained by fraud. *Lord Hardwicke rel. plaintiff, both in respect to the transactions relating to the mortgage, and also in regard to the grant of the stewardship.*

*deben on a Warrant
as per B.C. 92*

A Bill was brought by the plaintiff as a mortgagor, to relieve against the defendant the mortgagee, for taking advantage of his necessities, and forcing him, at the end of every six months, to turn the interest into principal at 5 per cent. whereas the original mortgage was only 4 and $\frac{1}{2}$, and forcing, at the time the mortgage was paid off, upon an advance of six months interest, over and above the interest which was upon the mortgage, notwithstanding the mortgagor had given the defendant six months notice of his paying off the mortgage.

The bill is likewise brought to set aside a grant to the defendant of the place of steward to a private manor of the plaintiff's, as it was obtained by fraud and imposition, the defendant making the plaintiff believe that the grant of the stewardship was so drawn, that he might revoke it at pleasure, the same time the defendant had taken it to himself and his heirs.

[331] LORD CHANCELLOR,

Where there is an act of extortion, this court will do justice without refunding without inquiring into the particular circumstances of the imposition.

I am surprized and sorry that this affair is brought before this court, and I am clearly of opinion that the plaintiff is intitled to be relieved upon the principal matters prayed by his bill.

The first relief prayed, is in respect of the computation of the interest, by turning it into principal, and charging 5 per cent. interest upon interest at the end of every six months.

Secondly, in respect to 119 l. 16s. 3d. advanced for 12 months interest over and above the common interest.

Thirdly, The fifty days interest after the notice expired for paying off the mortgage, which was entirely owing to the defendant's own delay.

An agreement to turn interest upon a mortgage into principal, must be done fairly, and on the advance of fresh money.

As to the first; the excuse for the defendant is, that the mortgagor does not pay interest regularly, the mortgagee upon agreement turn the interest into principal (1); but this must be done fairly, and is generally upon the advance of money, and even then it is reckoned a hardship upon a mortgagor and an act of oppression: nor is there any proof here of money lent.

(1) *Vide Sir Thomas Mace's case, Ca. temp. Tull. 40. ante 1 vol. 304 note 1.*

But what weighs with me is the computation at the end of every six months, and the turning interest into principal, and making that interest carry 5 *per cent.* when the original mortgage carried but 4 and $\frac{1}{2}$, which is a very extraordinary proceeding, and therefore upon this part of the case the plaintiff is to be relieved; and I shall direct the Master to take an account only of what is due upon the 4000*l.* at 4 and $\frac{1}{2}$ *per cent.* and the plaintiff to pay no more than 4 $\frac{1}{2}$ for any fresh money that shall appear to be due to the defendant (1).

THORNHILL v. EVANS.

Lord Hardwick^d directed the Master to take an account only of what is due on the original sum at four and half *per cent.* and the plaintiff to pay the same rate

of interest for any fresh money, that shall appear to be due.

Secondly, As to the 119*l.* 16*s.* 3*d.* advanced for the last six months interest over and above the common interest.

This is a most extravagant affair; nor is there any colour for taking a double interest upon the last half year; the pretence indeed is, that the plaintiff by way of gratuity for services formerly done agreed to give double interest for the last six months, whenever he paid off the mortgage.

Can it be thought that this court will suffer a gentleman of the bar to maintain an action for fees, which is *quiddam honorarium* or, if he happens to be a mortgagee, to insist upon more than the legal interest, under pretence of gratuity or fees for business formerly done in the way of a counsel? To admit such a clandestine way of coming at fees, is of much worse consequence than the other.

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This court will not suffer a counsel to maintain an action for fees, or, if he happens to be a mortgagee, to insist on more than legal interest.

interest, under pretence of a gratuity for business formerly done in the way of counsel.

It has been said, and truly said, a mortgagee may refuse to part with the deeds till his money is paid; but still a fair mortgagee will not deny an inspection of deeds in his hands, when he has notice to be paid off.

A mortgagee may refuse to part with the deeds till the money is paid,

but ought not to deny an inspection in his hands.

The consequence then of this is, that the sum of 119*l.* 16*s.* 3*d.* must be refunded, with the interest which has been received upon it.

Thirdly, in respect to the fifty days interest after the notice expired for paying off the mortgage.

The principle which the defendant goes upon is, that if interest is an arrear when the mortgage is paid off, he shall have

Though interest is in arrear when the mortgage is

paid, a mortgagee shall not have interest for that interest.

(1) His Lordship directed an account of the principal and interest on said mortgage of the 10th of May, 1732, for the said sum of 4000*l.* with interest, at 4*l.* 10*s.* *per cent.* to 30th of June, 1739, and also of the several other sums of money afterwards lent upon the said security, with interest at 5*l.* *per cent.* In the taking of which account, the Master

was to inquire what arrears of interest were from time to time agreed by plaintiff, in writing, to be turned into principal after such arrears became due, and such arrears to be considered as principal from the respective times of such agreement, and to carry interest at 4*l.* 10*s.* *per cent.* Reg. Lib. Lib. B. 1741. fol. 321.

THORNHILL v. EVANS. interest for that interest, which was never allowed of court of equity (1).

Fourthly, As to the grant of a stewardship in fee.

It is void *ipso facto* (2), for it may possibly come to a woman which is not to be suffered where it is a judicial office. In question here, whether it is an imposition: in the place it has not been proved the plaintiff ever looked upon grant; and very liable to be imposed upon, supposing he read it, since he did not know what an inheritance was, withstanding he saw the grant was to a man and his heirs.

Besides, the defendant abused the trust which this gentleman reposed in him; for, as he was his counsel, he ought to have told him the effect of these words.

The defendant having abused the trust reposed in him, and manifestly intending to get the estate into his own hands, the grant of the stewardship must be delivered up, and the plaintiff must have his costs of suit.

Another strong ingredient in this case is, the defendant's manifest intention to get the estate into his own hands; and therefore, taking it with the other circumstances, this grant must be delivered up to the plaintiff; and he must likewise have his costs to this time; and I reserve the other costs till it comes back to the Master's report (3).

(1) *Proctor v. Cooper*, *Proc. Cha.* 116.
2 *Fern.* 377.

(2) *Vide Perk. f.* 99. 101.
(3) *Reg. Lib. B.* 1741. fol. 321.

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Case 231.

Anon., July 2, 1742.

Length of time pleaded in bar to a redemption of a mortgage, being made in 1713, the mortgagor's solicitor appearing to have settled an account in 1730, in order to pay the mortgage, Lord Hardwicke held that would save the right of redemption (1).

LENGTH of time was insisted on by the defendant, in bar to the redemption of a mortgage sought by the plaintiff, it being as long ago as the year 1713.

LORD CHANCELLOR,

I own I am not for encouraging redemption of mortgage very long standing, but then the court must not wink so hard as not to allow of it in any case.

Coverture is no excuse for not redeeming a mortgage; for if a woman becomes afterwards discoverd, the statute of Limitations will run from that time.

Here there is a pretence of coverture, which is no excuse cause if a woman becomes afterwards discoverd, the statute of Limitations will run from that time, and though she should marry again, it will run after the second marriage.

Tenancy by the curtesy is no excuse, for it is of no consequence to a mortgagee, who has the equity of redemption; if they do not make use of their right, they shall be barred.

The next excuse is that here was a tenancy by the curtesy, but there would be no bounds to a redemption if this was an excuse, and no mortgagee could ever be quieted in the possession for it is of no consequence to the mortgagee, who has the equity of redemption, if they do not make use of that equity they shall be barred.

(1) *Vide Aggas v. Pickers*, *post.* 3 vol. 225.

ANON.

But though the mortgage was in 1713, in the present case, yet, no longer ago than 1730, the clerk to the solicitor for the mortgagor had actually settled an account of what was due for principal and interest, in order to pay off the mortgage; and though no further proceedings have been had, yet that shall save the right of redemption; but however, I will not over-rule the plea entirely, but reserve it till the hearing.

Clarke versus Periam, July 3, 1741, upon a Re-hearing.

Case 232.

THIS was a bill brought by the plaintiff, to establish a bond for securing an annuity of 60 *l. per ann.* given her as *premium pudicitie*; the defendant by a cross-bill insists the plaintiff was a lewd woman, and a common prostitute, and * for that reason was not intitled to have the annuity established, and therefore prays that the security may be delivered up (1).

S. C. post. 337. A bill brought to establish a bond, for securing an annuity of 60 *l. per ann.* given the plaintiff, as *premium pudicitie*;

a cross bill praying the security may be delivered up, as the plaintiff was a common prostitute. The defendant's counsel offered to prove the plaintiff guilty of lewdness with a particular person; it was objected, the charge in the cross bill being only she was a lewd woman, the defendant ought to confine herself to a general character, and not to particular instances. Lord Hardwicke thought the objection of great consequence to the practice of the court, and took time to consider till the first day of re-hearing after the term.

Mr. Clarke counsel for the plaintiff in the original cause,

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Said the annuity is only 60 *l. per ann.* and not to take place till after the death of the obligor.

A material piece of evidence was offered now for the plaintiff, which was not at the former hearing, the register of her baptism, which appeared to be in 1711, and therefore she could be only 16 at the time of her acquaintance with *Periam*, in the year 1727, and he was then of full age, so that it cannot be conceived that she was capable of imposing upon him, and seducing him to the giving this bond; for the law presumes infants not capable to govern and manage themselves, much less of imposing upon others, especially on persons of full age.

Remorse
W. H. H. H.
3 Mike H. H.

Ten witnesses for Mrs. *Clarke*, and only one of them a relation, swear positively that she had an unblemished character, previous to her acquaintance with *Periam*.

There is no evidence of her returning to vicious courses after *Periam* left her, which must have been the natural consequence, if she had been abandoned before, and therefore this is a strong presumption she was not a lewd woman.

There are but four witnesses for the defendant, who swear to particular instances of lewdness, and these not from their own knowledge, but that they were told so by persons who had a criminal conversation with her.

(1) When this cause was first heard, the original bill was dismissed; and it was decreed, in the cross cause, that the bond should be delivered up to be cancelled; and that the plaintiff, in the

original cause, should pay the defendant in that cause, and the plaintiff in the cross cause, costs in both causes. *Reg. Lib. A. 1741. fol. 687.*

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PERIAM.

The counsel for the defendant offered evidence to prove plaintiff guilty of acts of lewdness with a particular person, Mr. *Abingdon*, before she was acquainted with *Periam*.

An objection was taken by the plaintiff's counsel, that charge in the cross-bill is only that Mrs. *Clarke* was a lewd man of an infamous character, and that the bill does not rec any answer to this, and therefore the defendant in the evidence ought to confine himself to a general character, and not to particular instances, according to the rule of law upon examining characters; for the charge here is so loose and general, that was impossible for the plaintiff to know at what time or place with what person, they intended to charge her with acts of lewdness.

And that, in order to let them into this evidence, they ought to have charged that she was kept by the person they pretend to have had criminal conversation with her.

[335] The allegation is general, that she is a lewd woman, but evidence goes to particular instances of prostituting her chastity.

Mr. *Murray* on the same side argued, that they ought to be confined to evidence as general as the allegation: in every case of law, where the character of a person is called in question, the examination must be general; and goes on good ground because they will not suffer witnesses to come upon surmise with particular instances, which the party is not prepared to answer.

If they had examined to her being a lewd woman in general or to her being generally of an infamous character, it would have been relevant to the issue.

The case of Lord and Lady *Donerail*, which has been mentioned by Mr. *Clarke*, is not fully stated, because taken only from the printed cases.

By the bill, Lady *Donerail* charged that after her marriage she behaved with the utmost duty and tenderness.

Lord *Donerail* in his answer says, she did not behave with duty and affection as became a virtuous woman, much less as became his defendant's wife.

Virtue, when applied to a wife, in all languages is equally applied to chastity.

The evidence in that case to support the defendant's claim was a particular instance of lewdness with Mr. *Barry*: the Chancellor of *Ireland* was of opinion it should be read upon the strength of this evidence chiefly, dismissed Lady *Donerail's* bill; she appealed to the House of Lords, and in *Feb* 1734-5, it was heard: and upon the dangerous consequence of admitting such evidence, on general charges to the character and reputation of women, the House of Lords would not permit it to be read.

It could not possibly be foreseen what this witness would say, and therefore the plaintiff was not capable of cross-examining her to this particular fact.

Mr. *Attorney General* insisted, in support of the propriety of this evidence, that in the case of *Bennet v. Vade*, *June*

1742 (1), though the allegations were general, and general weakness only charged upon Sir *John Lee*, yet the court admitted instances of particular weakness to be read, which is a parallel case with the present.

He said in the case of Lord and Lady *Donerail*, the doubt in the House of Lords was, whether the word *virtuous*, in the defendant's charge, could let him into proof of her violating her chastity; and the Lords were of opinion, that as the very maintenance and support of Lady *Donerail* depended upon the event of this cause, that they ought to be tender of giving too great latitude to the word *virtuous*, or extend it to one virtue more than another, and therefore denied the evidence.

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He cited *Sidney v. Sidney*, which was first heard at the *Rolls*, where Sir *Joseph Jekyll* allowed evidence to be read of the same kind with this; but Mr. *Attorney General* said he was doubtful, whether Lord Chancellor *Talbot* on the appeal admitted it; to which the plaintiff's counsel made answer, that his Lordship refused to admit it. 3 *Wms.* 269. Mr. *Brown* of the same side.

It has been said no evidence must be read in this court, unless the nature of the evidence itself is put into issue.

Where lewdness is charged upon a woman, is it necessary to set forth at what particular tavern, or with what particular gentleman, she has been guilty of lewdness?

Besides, this would be attended with ill consequences, because it would lay open the case too much, and put the adversary party upon their guard, and give them an opportunity of squaring their own evidence, by the proofs of the other side.

In cases of insanity, the court never expect particular acts to be charged, and yet the evidence goes to particular instances.

Mr. *Weldon* of the same side, insisted, that the interrogatories were general, and that this evidence came out upon the general interrogatory of, Is she, or is she not a lewd woman, and of an infamous character?

LORD CHANCELLOR,

I do not remember that this objection was made at the former hearing; and as the chief stress of the cause depends upon it, it is become a question of very great weight, and therefore I will put it off to the first day of rehearings after term, and will look in the mean time into the case of Lord and Lady *Donerail*, and *Sidney* and *Sidney*, and *Cox* and *Robinson*, about a twelvemonth ago in *Lincoln's-inn hall*; this question besides is of great consequence to the rules and practice of the court, and therefore deserves consideration.

Case 223. *Clark versus Periam, July 27, 1742. Rehearing.*

LORD CHANCELLOR,

S. C. ante 333.

THE question, upon which this cause stood over, was whether the deposition of one *Rogers*, taken in behalf of the defendant in the original cause ought to be read; it is an attempt to prove that Mrs. *Clark*, before the time of *Periam's* giving the bond to her, was kept by a particular person one Mr. *Abingdon*, and had criminal conversation with him.

It is sufficient to put in issue a general charge of lewdness, and under this you may give particular evidence, but then it must be pointed, and applied to the general charge (1).

The objection is, that the particular facts to which *Rogers* is examined should have been put in issue specially, and that they are not sufficiently so in this cause.

As to the nature of the suits, the original bill is brought to have satisfaction out of the personal estate of the late Mr. *Periam* for the bond.

The cross bill is brought by the widow of Mr. *Periam*, and is to be relieved against this bond, and to have it cancelled; and the equity is founded upon this, that it was given by Mr. *Periam* to Mrs. *Clark*, *ex turpi causa*, and that she was a lewd woman & an infamous character, and therefore it is insisted the court should relieve against it.

The counsel for the plaintiff in the original bill insist, that under this allegation in the cross bill, the plaintiff there is not intitled to examine to any thing but her character in general because it is impossible for Mrs. *Clark* to be prepared to give an answer to the particular facts charged; for though every body supposed to be ready to support a general character, yet not a particular fact.

But I am of opinion the present case differs from all the cases relating to examinations to general characters, both as the reason of the thing, and as to the authorities.

In the first place with regard to authorities, there is one point, *Whaley versus Norton & al*, 1 *Vern.* 483. I do not mention this case as an authority of judgment, but only to show the intention of the court and the bar at that time; for it was not put in issue there, that the defendant was a common strumpet*.

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There have been two cases since I sat in this court; the first was *Atkins versus Farr*, February 28, 1738. vide 1 *T. Atk.* 28. The charge there was, that at and before the time of his becoming acquainted with her, she was a woman of lewd fame and bad character, and an orange girl at the playhouse.

(1) *Moore v. Moore*, ante 1 vol. 276.

* The bill was to be relieved against a bond to a woman whom the plaintiff kept, not being charged or put in issue in the cause, that she was a common strumpet, depositions to this fact, though proved, not allowed to be read. 1 *Vern.* 483.

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PERIAM.

The next was *Robinson* versus *Cox*, after *T. term* 1741. the charge there that she was a woman of lewd fame; and they entered into the most particular account and particular facts that could possibly be imagined, of drawers being sent by gentlemen to bring her to particular taverns.

And yet the present objection was not then made in either of those cases, it being the common way of charging matters of this sort; so that what is now disputed, was thought to be the rule of evidence at that time.

In the case of *Sidney* versus *Sidney*, *February* 7, 1722 (1), at the *Rolls*, a bill was brought for performance of articles entered into before marriage, by the wife against the husband: Sir *Joseph Jekyll* dismissed the bill, and was of opinion that the deposition in that case to prove her an adulteress, ought not to be read, because the answer of the husband had not put the charge of adultery in issue, for the words were, *she had misbehaved herself*, which does not imply adultery, for you must certainly make a general charge of it.

That a wife *has* misbehaved herself, does not imply she is an adulteress, and a deposition in that case to prove her one, ought not to be read.

The case which is principally relied upon for the plaintiff in the original cause, is, Lord and Lady *Donerail*, 1735.

Saying that a wife did not behave with that

duty as became a virtuous woman, will not intitle the husband to enter into proof of her committing adultery, unless there is an express charge of this kind, for the virtue of a woman does not consist merely in her chastity.

The bill was brought by her for separate maintenance; the question arose upon this; Lady *Donerail* had charged by way of merit, that she had behaved with the utmost duty and respect.

My Lord *Donerail* in bar to the equity insisted on by the bill, says in his answer, *she did not behave with that duty and affection as became a virtuous woman, much less this defendant's wife*. In order to support this suggestion, he entered into particular facts of her adultery with one *Barry*, and in the Chancery in *Ireland* the depositions were read; but upon an appeal to the House of Lords here they were not admitted.

I was not present in the House of Lords at the hearing of that cause, and therefore do not know the particular reasons: but a very strong one appears upon the pleadings themselves, which distinguishes it from the present case, and brings it to that of *Sidney* versus *Sidney*, because there is no express charge of adultery in Lord *Donerail's* answer.

The virtue of a woman does not consist merely in her chastity, for she may be guilty of acts of cruelty; and indeed it appeared in this very cause that she had not only used her husband with inhumanity, but beat him; a woman too may be addicted to gaming, and other extravagancies, which is not a virtuous behaviour.

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In the present case the plaintiff herself has laid a foundation, by suggesting that she was a kept mistress.

These are all the authorities: from thence may be gathered the uniform sense in those determinations, that it was sufficient to

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PERIAN.

put in issue a general charge of lewdness, and that under this may give particular evidence; and I think I have heard it down so by Sir *Joseph Jekyll*; but then your particular evidence must be pointed, and applied to the general charge.

Improper to charge in a bill, a woman had criminal conversation with particular persons, as it would affect the character of strangers, and fill it with private scandal.

Secondly, As to the reason of the thing.

Where in a criminal prosecution, the prisoner to strengthen his character enters into particular facts to support it, the prosecutor may likewise examine to particular facts.

The cases urged by the plaintiff's counsel in the original relating to criminal prosecutions, must be allowed to be for in examining to characters you can only enter into general facts; but if there is a criminal prosecution, and the prisoner in order to strengthen the evidence for his character, enter particular facts to support it; this is called a challenge to the prosecutor, and then he may likewise examine to particular facts.

But in criminal prosecutions it comes in only collaterally incidentally, and is not the particular thing to be tried: when that is the case, they are not supposed to be proved with evidence.

In an indictment for keeping a common bawdy-house or gaming-house, though the charge is general, yet you may give particular facts in evidence.

But compare this with cases where the character is the particular issue to be tried: suppose in the case of an indictment for keeping a common bawdy-house, without charging any particular fact, though the charge is general, yet at the trial you may give in evidence particular facts, and the particular thing doing them; the same rule as to keeping a common gaming-house.

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In an issue on *non compos mentis*, you may give particular acts of madness in evidence, and not general only that he is insane.

This is the practice in all cases where the general behaviour, quality, or circumstance of the mind, is the thing in issue; as in an instance in *non compos mentis*, it is the experience of every man that you give particular acts of madness in evidence, and not general only, that he is insane; so where you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined in general to his being a drunkard, but particular instances are allowed to be given.

In an indictment of *barretery*, the defendant is intitled to a copy of the articles, which are to be insisted on against him at the trial.

Indeed there is one, the case of *barretery*, which is contrary to the former, where, in an indictment for this offence, the defendant ought to have a copy of the articles to be insisted on against him at the trial, before-hand, that he may have an opportunity of preparing a defence; but that is a particular case, and differs from others; for the drawing of the line between pursuing him as a *barreter*, and following the course of his profession as an attorney, is a very difficult thing, because it is a crime of which an attorney for the most part only can be guilty.

Where the general life or conversation is in issue, the person must be prepared to invalidate that evidence, otherwise where it comes in collaterally

Wherever the general life or conversation is put in issue, notice to the person who is charged, that she should be prepared to invalidate that evidence, otherwise where it comes in collaterally

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PERIAM.

take off the weight of that evidence; but where it comes in laterally, you shall be confined to general evidence.

This seems to me to be the distinction, and the grounds of it; and if I was of a different opinion, I should overturn the constant course of this court, and make the greatest confusion.

Lord Chancellor upon the merits of the cause proposed, that the bond should be delivered up to be cancelled, and that there should be no costs on either side, upon which it stood over for the plaintiff's counsel to recommend it to their client to acquiesce under this proposal.

The next day, by the consent of the parties in both causes, Lord Hardwicke ordered that a perpetual injunction be awarded to stay the proceedings at law of the plaintiff in the original cause on the bond in question (1).

(1) His Lordship, with consent of the parties, reversed the former decree, as to costs; and directed a perpetual injunction to stay the proceedings at law on the bond. *R. g. Lib. A.* 1741. fol. 187. With respect to cases of this nature, *vide H'bailey v. Norton*, 1 *Vern.* 183. *Mathew v. Hanbury*, 2 *Vern.* 187. *Peabam v. Manning*, 2 *Vern.* 242. *Spi- cer v. Hayward*, *Proc. Cha.* 114. *Cray v. Root*, *Ca. temp. Talb.* 153. *Annan- dale v. Harris*, 2 *P. W.* 432. *Lady Cox's case*, 3 *P. W.* 339. *Robinson v. Gee*, 1 *Ves.* 254. *Priest v. Parrot*, 2 *Ves.* 160. *Walker v. Perkins*, 3 *Burr.* 1568. *Hill v. Spencer*, *Amb.* 641. *Ex parte Cotterel*, *Coarup.* 742.

Merfon versus Blackmore, July 12, 1742, at the Rolls.

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THE question arose upon the will of one John Moore.

Case 234.

"All his lands, tenements and messuages whatsoever, after debts and legacies paid, and funeral expences are discharged, the testator gives to his brother-in-law James Merfon the plaintiff."

A testator gives to James Merfon all his lands, tenements, and messuages whatsoever, after

debts and legacies paid, and funeral expences are discharged: the debts being charged only contingently on the real, if the personal estate should be deficient, the Master of the Rolls held the plaintiff has only an estate for life (1).

The question, whether this is a devise in fee to the plaintiff, or only an estate for life.

Brown for the plaintiff cited the case of *Freaker versus Lee*, 2 *Lev.* 249, and *Sir Th. Jones* 113.

The will sets out too with general words, As to all my wordly goods whatsoever, I intend to dispose of as follows; which shews the testator's intention to dispose of the whole. The legacies too are appointed to be paid in two months, which amount to more than the annual value of the estate devised, and consequently must be a devise in fee, or otherwise the plaintiff would be a loser instead of receiving any benefit from this legacy.

(1) *Vide* note to *Ridout v. Payne*, *post.* 3 vol. 486.

Mr.

PERSON v. Mr. Harvey, for the defendant the heir at law, cited 1 Cro
ACKMORE. 330. *Dickens versus Marshall*, mentioned by Lord Ch. Just
Holt in *Cole versus Rollinson*, Salk. 234.

Master of the Rolls. Where a gross sum is to be paid out of the
lands, to be sure, it gives a fee to the devisee of those lands (1).

But here the debts are not at all events charged upon the
real estate, but only contingently, if the personal estate should be
deficient.

And therefore does not come up to the cases cited of a gross
sum to be paid out of land, and consequently gives no more than
an estate for life to the plaintiff the devisee.

But at the instance of the plaintiff's counsel reserved this point
till it comes back upon the Master's report.

(1) *Vide Doe v. Richards*, 3 Term. Rep. 356. *Goodright v. Stocker*, 5 Term. Rep. 13.

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Pope versus Curl, June 17, 1741.

Case 235.

The defendant,
on his answer
being put in,
moved to dis-
solve an injunc-
tion against his
vending a book

A Motion was made on behalf of *Curl* the bookseller, upon
his having put in his answer to dissolve an injunction
which Mr. *Pope* had obtained, against his vending a book inti-
tled, *Letters from Swift, Pope, and others*.

vending a book of letters from *Swift, Pope, and others* (1).

in Albert

Warrington

and Hyndes

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LORD CHANCELLOR,

The first question is, whether letters are within the groun-
and intention of the statute made in the 8th year of Queen An-
c. 19. intituled, An act for the encouragement of learning,
vesting the copies of printed books in the authors or purcha-
of such copies.

A collection of
letters as well as
other books, is
within the in-
tention of the
Statute of Queen
Anne, the act for the encouragement of learning.

I think it would be extremely mischievous, to make a dif-
tinction between a book of letters, which comes out into the world
either by the permission of the writer, or the receiver of the
and any other learned work.

The same objection would hold against sermons, which
author may never intend should be published, but are coll-
from loose papers, and brought out after his death.

Another objection has been made by the defendant's co-
that where a man writes a letter, it is in the nature of a gift
receiver.

The receiver of
a letter has, ac-
cording to the
law, a joint
property with
the writer, and
the possession
does not give
him a licence to publish.

But I am of opinion that it is only a special property
receiver, possibly the property of the paper may belong
him; but this does not give a licence to any person whatso-
publish them to the world, for at most the receiver has
joint property with the writer.

(1) See *Gyles v. Wilcox*, ante 141.

The second question is, whether a book originally printed in *Ireland*, is lawful prize to the booksellers here.

POPE v.
CURL.

If I should be of that opinion, it would have very pernicious consequences, for then a bookseller who has got a printed copy of a book, has nothing else to do but send it over to *Ireland* to be printed, and then by pretending to reprint it only in *England*, will by this means intirely evade the act of parliament.

Reprinting a book in *England*, which originally was pirated and printed in *Ireland*, will not be suffered, being a mere evasion of the act.

It has been insisted on by the defendant's counsel, that this is a sort of work which does not come within the meaning of the act of Parliament, because it contains only letters on familiar subjects, and inquiries after the health of friends, and cannot properly be called a learned work.

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It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading.

No works have done more service to mankind than those upon familiar subjects, and which never were intended to be published.

The injunction was continued by Lord Chancellor only as to those letters, which are under Mr. Pope's name in the book, and which are written by him, and not as to those which are written to him.

The injunction continued as to letters written by Mr. Pope, not as to those written to him.

Guillam versus *Holland et e contra*, October 14, 1741, in the Case 236. paper of exceptions.

WHERE, said Lord Chancellor, a portion is charged upon land, and the will does not mention interest, the court will not give any more than 4 per cent. though the legal interest is 5 per cent. this is a rule which has been laid down of late years (1), and has been extended likewise to cases, where legacies and portions are charged upon personal estates (2).

It is the rule of this court to allow no more than 4 per cent. where the will does not mention interest on portions charged upon land, and

has also been extended to the cases of legacies and portions charged upon personal estate.

(1) So *Hodgson* v. *Rawson*, 1 Ves. 48. *Moore* v. *Moore*, post. 3 vol. 402. *Bryant* v. *Speke*, 1 Ves. 171. *Trimleston* v. *Colt*, 1 Ves. 277. *Denton* v. *Shellard*, 2 Ves. 239.

(2) So *Beckford* v. *Tobin*, 1 Ves. 311. *Wood* v. *Briant*, post. 523. *Contra* *Moore* v. *Moore*, post. 3 vol. 402. *Szwynsen* v. *Scarwen*, 1 Ves. 99. *Bryant* v. *Speke*, 1 Ves. 171.

Booth versus *Booth*, July 14, 1742.

Case 237.

A Bill was brought by the plaintiff against the defendant for an account of the rents and profits of an estate during the time he was guardian to the plaintiff's brother, and for an injunction to stay the defendant's proceedings upon an ejectment for

Trimleston v. Colt
1 Ves. 277.
29.

BOOTH v.
BOOTH.

for the possession of the estate which is mortgaged to him; cause he is proceeding in this court to foreclose the equity of redemption.

LORD CHANCELLOR,

A mortgagee is not precluded from bringing an ejectment at law at the same time he has a bill of foreclosure depending here.

Though the defendant is foreclosing the equity of redemption here, yet he is not precluded from bringing an ejectment at the same time, unless there is something very particular to it out of the common case.

*The only material question is, whether there are any grounds for me to presume the mortgage is satisfied: As to the per estate, it is most clear that the plaintiff's brother was an imbecile man, and that he made an assignment of it to a neighbor before his death.

Then how can I infer necessarily from this, that the mortgage is satisfied: especially when two witnesses swear for the defendant, that upon his quitting and delivering up the possession of the mortgaged premises, he did it upon these express terms provided the interest due on the mortgage should be paid.

But however it is not quite so clear as the common case, but entangled with an account of the personal estate, and therefore the plaintiff will agree to give security to redeem, I will grant an injunction to stay proceedings upon the ejectment, and may be better for all parties, as it will keep the possession in suspense till the account is determined.

Case 238. *Smith versus Newport and the Earl of Bradford, July 14, before the Master of the Rolls.*

The Earl of Bradford by his will gave all his estate to trustees, in trust for the defendant, Mr. Newport, and the heir of his body, and to pay such sums out of the rents and profits for his maintenance, as Lord Bradford should, by any writing, appoint. By a codicil he directed the trustees, during Mr. Newport's minority, to pay the rents to the plaintiff, so much as she pleased applied for his maintenance, and the residue to her own use; by another codicil he directed the trustees not to settle the estate on Mr. Newport, and the heirs of his body, till 26, and till then such sum as the trustees and the plaintiff shall think fit. Mrs. Smith insisted she was intitled to receive the rents and profits till Mr. Newport attained the age of 26, but the Master of the Rolls was of opinion they were vested in Mr. Newport at 21, and the time of receiving prolonged only till 26, and decreed she should account for the rents, &c. from his age of 21 to 26, to the committee of his estate, Mr. L. being found a lunatick.

THE only material question in this cause is, to whom the rents and profits of the late Earl of Bradford's estate should go from the defendant Newport's age of 21 till his age of 26.

By the defendant, Mr. Newport, and the heir of his body, and to pay such sums out of the rents and profits for his maintenance, as Lord Bradford should, by any writing, appoint. By a codicil he directed the trustees, during Mr. Newport's minority, to pay the rents to the plaintiff, so much as she pleased applied for his maintenance, and the residue to her own use; by another codicil he directed the trustees not to settle the estate on Mr. Newport, and the heirs of his body, till 26, and till then such sum as the trustees and the plaintiff shall think fit. Mrs. Smith insisted she was intitled to receive the rents and profits till Mr. Newport attained the age of 26, but the Master of the Rolls was of opinion they were vested in Mr. Newport at 21, and the time of receiving prolonged only till 26, and decreed she should account for the rents, &c. from his age of 21 to 26, to the committee of his estate, Mr. L. being found a lunatick.

The plaintiff Mrs. Smith and the defendant Mr. Newport found their claim upon the will and codicils of the Earl of Bradford.

The Earl of Bradford upon neither, but merely as heir to his brother the late Earl.

The late Earl by his will dated the 8th of May 1730, "all his estate to trustees and their heirs, in trust by them to mortgage to pay all his debts and legacies, and charges aforesaid, devised that the said trustees should stand seized of the real estate in trust for the only use of the defendant

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port and the heirs of his body, and for default of such, in trust for such person and persons, and for such estate estates, as the testator should by any deed or writing direct and appoint; and for want of such direction, then to the testator's own right heirs: and that the trustees should out of the rents and profits of his real estate pay such sums of money for the education of the defendant Mr. Newport during his minority, as the testator should by any deed or writing direct and appoint."

By his second codicil the testator directs, that the trustees should, during the minority of Mr. Newport, till the time of his death, in case he should die before twenty-one, pay the rents of all his estate to the plaintiff Mrs. Smith, so much thereof as she should think proper, to be applied for his maintenance, and the residue to her own separate use."

By his third codicil, reciting the will and former codicils, expressly directs, that the trustees shall not settle the estate of the defendant Mr. Newport and the heirs of his body until he shall attain 26 years, and until that age he should have a handsome allowance for his maintenance as the plaintiff and the trustees should think fit."

The testator died the 25th of December 1734, the plaintiff brought her bill in 1735, for several purposes, and among the rest to set into the possession of the several estates till the defendant Newport should be intitled. It was decreed in 1739, that the plaintiff should be paid the surplus rents and profits till the defendant Mr. Newport should attain his age of 21, and upon his attaining that age, all parties were to be at liberty to apply for directions touching the said trust-estate. And on this came on before his Honour for further directions.

*Per of the Rolls**. I shall first consider the question as it lies between the plaintiff and Mr. Newport. * *William Fortescue, Esq.*

The plaintiff insists by Mrs. Smith, that she is intitled to the rents and profits of all the real estates devised under the will of the late Sir John Bradford till Mr. Newport's age of 21, and that the testator, having, by his third codicil, prolonged the time till his son should attain 26, it will follow, as a natural consequence, that the testator intended she should receive the rents and profits till that

may here observe, first, that the plaintiff is not intitled to the rents and profits of the defendant Mr. Newport is a minor, nor is the direction that the rents and profits should be paid to her during his minority sufficient to intitle her, but the words *till he arrives at his majority*.

The testator's intention in extending it to Mr. Newport's age of 26 seems to me to be, to prevent him from alienating at 21, therefore it does not necessarily follow, that by prolonging the time he has given the rents and profits to the plaintiff till the defendant Mr. Newport attains his age of 26, for it might be intitled, to prevent any extravagance he should be guilty of at an age as 21, and it might be done too in order to lay him from his age of 21 to 26, to pay off the incumbrances
L II. Y upon

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upon the estate. No necessary conclusion therefore can be drawn from it one way or another.

It is certain the intention of the testator was, that the plaintiff should enjoy the rents and profits of all the estates till Mr. Newport attained his age of 21, but if he intended that she should likewise have the rents till he arrived at 26, he would have retracted it over again in the same manner as he had done with regard to his age of 21, and the third codicil shall not be extended to make any alteration in the will further than the express will warrant.

Upon the whole of this point I am of opinion the plaintiff is not intitled to the rents from the defendant Mr. Newport's age of 21, to his age of 26.

The second question is between the defendant Mr. Newport and the Earl of Bradford.

Whether the rents and profits are disposed of by the testator at all between Mr. Newport's age of 21 and his age of 26.

It is said very truly, an heir at law shall not be disinherited by implication only; and for this purpose were cited the cases *Stephens versus Stephens*, *Cases in the time of Lord Tulkot* 228, *Hopkins versus Hopkins*, *id.* 44 (1).

With regard to this question, it must be considered that the heir at law is disinherited by the express words of the will that the whole estate is given to trustees and their heirs, in trust for the defendant Mr. Newport in tail, and the plaintiff Smith in fee; so that the whole is disposed of, the legal estate vesting in trustees for the use of the defendant Mr. Newport, and in default of issue of him, to the plaintiff and her heirs; therefore the heir at law can have nothing, unless there is a revocation of what is before disposed of.

Now the third codicil does not revoke the estate-tail given to the defendant Mr. Newport, but only prolongs the time of his coming into possession: can this then amount to a revocation of the will as to the intermediate time; or does a direction that the rents and profits be not paid to Mr. Newport till his age of 26 prevent their going to the defendant Mr. Newport? I apprehend not at all: for though he is not to have the rents and profits till his age of 26, yet his interest in them is not taken away, though they are not immediately to be paid, yet they vest notwithstanding.

[347] Therefore I am of opinion that here is nothing undisposed of under this will, but that the rents and profits vest in the defendant Mr. Newport at 21, and the time of receiving only is prolonged till his age of 26 years (2).

(1) *Vide Hawyard v. Stillingfleet*, ante 1 vol. 424. note 1.

(2) " His Honour doth declare, that the surplus rents and profits of the said trust estate, from the time of the defendant Newport's attaining his age of

" 21 years, until he shall attain the
" of 26 years, over and above
" shall be allowed for his maintenance
" and the other out-goings of the
" estate do belong to the said defendant
" Newport; and such surplus rents
"

For these reasons I must decree the trustees to account for the rents and profits during this intermediate time from his age of 21 to his age of 26, to the committee of the defendant *Newport's* estate, he being found a lunatick.

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profits of the said estate over and above, &c. are from time to time, when the same shall amount to a competent sum, to be placed out at interest for his benefit. *Reg. Lib. B. 1741. fol. 501.*

Matthews versus Cartwright, July 16, 1742.

Case 239.

THE plaintiff had a note dated *March 25, 1737*, to this effect: Received of my brother Mr. *Thomas Matthews* 50*l.* to be secured by mortgage on my *Stoke-hall* estate. *Thomas Matthews gave the plaintiff at different times three notes, one 450*l.* another for 250*l.* and the last for 150*l.* and expressed in each to be secured by mortgage on Stoke-hall estate; the drawer of the notes had before mortgaged the same estate to the defendant; plaintiff takes in a prior mortgage to protect the sums lent upon the notes. Lord Hardwicke said there was nothing to differ this case from the common one, and that the defendant shall be paid the money lent on the notes in the first place, as well as the money due on the assignment of the prior mortgage.*

A 2d note dated *August 19, 1737*, in these words: Received 50*l.* of my brother *Thomas Matthews*, to be secured by mortgage on my *Stoke-hall* estate.

A 3d note for 150*l.* in the same terms.

The drawer of the notes had made a mortgage before of this estate to the defendant; the plaintiff afterwards brought in a prior mortgage, to protect the sums lent upon the three notes in the second mortgage Mr. *Cartwright*.

The defendant insists no money was ever advanced by the plaintiff as a consideration for the three notes; the Chancellor ordered to direct an issue to try the consideration, upon peril of costs against the defendant *Cartwright*, but he not caring to run the risk; Lord *Hardwicke* said, I am of opinion here is nothing in this case which is different from the common one of a first, second, and third mortgagee, where the last, after having notice of a second mortgage, prior in time to his own, buys in a first incumbrance to protect himself; in that case the second mortgagee shall not redeem without paying both first and third mortgage.

So in the present case the plaintiff, the note holder, upon his giving notice of the second mortgage to the defendant, and paying off the first incumbrance upon this estate, and taking an assignment of it, shall protect himself against the defendant's mortgage, and shall be paid in the first place the money lent on the notes, as well as the money due to him upon the assignment of the first mortgage (1).

1) *Wright v. Pilling*, *Prec. Cha.* 494. 491. *Morret v. Passee*, *ante* 53. *Armstrong v. Brace v. Marlborough*, 2 *P. W.* 2 *Vesf.* 662.

Case 240.

Shepherd versus Titley, July 17, 1742.

The court will not make an inconsistent decree in a second cause between the same parties, on account of the confusion it would create; but at the same

MR. *Shepherd*, who had a mortgage for 4000*l.* upon Mr. *Jennings's* estate in 1725, in compassion to the mortgagor in 1728, forgave him 800*l.* and three years afterwards Mr. *Shepherd* lent him 800*l.* again; during this intervening time Mr. *Titley* advanced the sum of 2000*l.* to Mr. *Jennings*, for which he gave him a mortgage upon the same estate in the year 1728.

time Lord *Hardwicke* declared, he would not upon an order in a former cause tie up the plaintiff, but will direct the cause to stand over, so as to give him an opportunity of laying the matter before the court on a bill of review, or otherwise, as he shall be advised.

Ydieu v. Rignol?
4 Hall. Ch. 377.

in report & Summ.
7. Nov. 1749

In 1729 Sir *Thomas Peyton* agreed to purchase of Mr. *Jennings* for the sum of 1850*l.* fee-farm rents of 70*l.* per ann. issuing out of Sir *Thomas Peyton's* estate, and payable to Mr. *Jennings*, imagining that he was at that time seised in fee, as he had covenanted with Sir *Thomas Peyton* that he had done no act to incumber; but Sir *Thomas Peyton* finding afterwards that Mr. *Jennings* had mortgaged the fee-farm rents to Mr. *Shepherd*, applied to him, who agreed that when he himself was paid his 4000*l.* and interest, that he would convey the fee-farm rents to Sir *Thomas Peyton*, who promised that if he was not disturbed in the possession of the fee-farm rents, he would not commence any suit against Mr. *Jennings*, and in this manner it has rested ever since.

In a former cause in 1736, at the Rolls, his Honour decreed that the Master should take an account of what was due upon the mortgage to Mr. *Shepherd* the present plaintiff, for principal and interest, and in the taking of that account the Master has allowed Mr. *Shepherd* no more for principal than 3200*l.*

Mr. *Shepherd* has now brought his bill against Mr. *Titley* to be paid the 4000*l.* and interest, or that Mr. *Titley* may stand foreclosed.

LORD CHANCELLOR,

There is a good deal of difficulty on one side and on the other; and I am very much at a loss what decree to make. The bill is now brought for a new purpose different from the former cause; and to be sure a mortgagee may, after a decree for a redemption, bring a bill for a foreclosure, unless it is done merely to accumulate the expence, and in that case the court will not give any countenance to it.

But I do not take this to be the principal end of the present bill; one intention of it is in order to make a fresh charge upon Mr. *Jennings's* estate, being a sum lent, as the plaintiff says, by him to the mortgagor upon a bond and judgment.

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Another end of this bill is to take in Sir *Thomas Peyton's* fee-farm rents, that they may contribute towards the satisfaction of the mortgage, and be brought in by way of aid, if the mortgage premises should be a failing fund.

Thick

se are two material points; and indeed the nature of the
tion is very dark, and attended with particular circum-

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TITLEY.

the plaintiff's charge before the Master, the interest from
o 1731, ceased upon 800*l.* on the mortgage for 4000*l.*
e mortgagor afterwards gives a bond and judgment for
r sum of 800*l.* advanced, and admitting this to be a new
y, though I do not determine that point now, yet the
ent is a lien upon the estate, if Mr. *Shepherd* had no notice
Titley's incumbrance; for then the equity of this court
rtainly allow Mr. *Shepherd* to tack the judgment to the
ge, and to be paid both in the first place before any mesne
rance can be admitted.

the great obstacle arises from the decree in the former
for the Master must settle the account under the direction
court, and cannot take any notice of the new loan, but is
d merely to the plaintiff's mortgage.

ere there is an original cause, and a decree made in it, you
have afterwards an inconsistent decree, in a second cause
n the same parties, for that would create such confusion
it to be endured by the rules of this court.

therefore I am of opinion that I cannot vary the decree in
mer cause; but then I will give the plaintiff Mr. *Shepherd*
ppportunity of trying the validity of this new debt of 800*l.*
r this transaction of the 800*l.* it appears by a deed exe-
etween the plaintiff, one *Davis*, and Mr. *Peyton*, that they
ed the plaintiff to be still intitled to the 4000*l.* this being
whatever light the 800*l.* might appear, the parties did
ak it worth their while to dispute the validity of this de-

n it will come to this question, Whether the plaintiff
t be at liberty to rehear, or to bring a bill in the nature of
f review, in order that this matter may be inquired into

I think it would be hard, merely upon an order in a for-
se, to tie up the plaintiff absolutely, so as to prevent his
his matter fairly before the court; therefore I direct the
f to pay the costs of the day, and the cause to stand over,
may have an opportunity of proceeding by bill of review,
rwise, as he shall be advised.

be 18th of June, 1743, there was a rehearing of the seve- [350]
les, when Mr. *Shepherd*, Mr. *Titley* and Sir *Thomas*, were
and cross bill before the court.

is insisted by Mr. *Shepherd's* counsel, that he having the
late, and no notice of the intervening incumbrance, Mr.
not intitled to redeem, but upon payment of the 3200*l.*
: 800*l.*

Shepherd insisted
that on advanc-
ing 800*l.* again,
the deed ought to
stand, as it did
before, a secu-

100*l.* the parties intending it should: and his counsel offered to read parol evidence to shew
tion; which was objected to, as being within the statute of Frauds and Perjuries. Lord *Hard-*
, that the loan of the 800*l.* cannot be considered as a continuance of the old mortgage in
d in respect to an intervening incumbrance, is a new one, admitting *Shepherd* to have notice,
first would not allow the parol evidence.

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TITLEY.

The case relied upon for Mr. *Shepherd* was, *The Dutcheſs of Marlborough verſus Brace*, 2 *Wms.* 491.

The mortgage deed being originally for 4000 *l.* it was inſiſted, on Mr. *Shepherd's* advancing 800 *l.* again, the deed ought to ſtand, as it did before, a ſecurity for 4000 *l.* it being intended ſo by the parties; and the plaintiff's counſel offered to read parol evidence, to ſhew this intention. But the counſel for Mr. *Titley* objected to this evidence, as being within the ſtatute of frauds and perjuries; for there being a receipt on the back of the mortgage deed for 800 *l.* of courſe it appeared by the very deed itſelf, that in 1728 only 3200 *l.* principal remained; and therefore it would be a contradiction in terms to ſay, that 800 *l.* lent in 1731, is part of the mortgage in 1725, for lending a different ſum in 1731, was the ſame as if it had been a new mortgage; ſo that Mr. *Shepherd* can never charge the mortgagee, or any other perſon ſtanding in his place, with its being a part of the old mortgage, unleſs there was an agreement for that purpoſe produced in writing.

LORD CHANCELLOR,

Whether theſe depositions were read before, is of no ſignification, the whole being open, and is now as an original hearing; but I am of opinion, that the parol evidence offered by Mr. *Shepherd's* counſel ought not to be read.

This was a mortgage for 4000 *l.* the legal eſtate was in Mr. *Shepherd*, the equity of redemption was in Mr. *Jennings*, and being ſo, the ſum of 800 *l.* appears to be paid off upon this mortgage by *Jennings* upon *Shepherd's* receipt, and who has likewiſe admitted the fact before the Maſter, and the circumſtance of the lending or re-lending was about three years after the 800 *l.* was diſcharged.

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Suppoſing it firſt as a new loan, it is impoſſible to charge the mortgaged eſtate with a further ſum without a written agreement, becauſe it is charging the equity of redemption with a ſum that is not in the deed.

But then the way, in which Mr. *Shepherd's* counſel would take it out of the common caſe, is, by ſhewing that it was agreed between the parties, that the eſtate ſhould be charged, as it was originally, with the 4000 *l.*

On the other hand, conſider, that the eſtate is diſcharged on the payment of 800 *l.* not by a ſolemn writing indeed, but by receipt under the hand of Mr. *Shepherd*.

It has been ſaid, that the whole between Mr. *Shepherd* and Mr. *Jennings* is to be regarded but as one tranſaction, and that the advancing the 800 *l.* again is a ſetting up, or a continuance of the original ſum.

But this cannot be, for it is not part of the ſame tranſaction for there is the diſtance of three years; and it is admitted here is a break, and intereſt does not go on for theſe three years.

Suppoſe there had been a puny incumbrance between the year 1728, and Mr. *Shepherd's* re-lending the 800 *l.* and that he had notice of this puny incumbrance, could he have over-reached it? Moſt certainly not.

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his shews that the lending the 800*l.* cannot be considered continuance of the old mortgage in 1725, but is, to all ends and purposes, a new one with regard to an intervening incumbrance within the three years, admitting Mr. *Shepherd* to notice; and therefore I cannot allow this parol evidence.

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TITLEY.

Then the counsel for the plaintiff produced a bond and judgment to him for the 800*l.* and insisted that he can tack the judgment to the mortgage, and so intitle himself to receive both sums: Mr. *Titley* can be let in upon the estate: for as Mr. *Shepherd* the plaintiff has brought a bill to foreclose Mr. *Jennings* and *Titley*, Mr. *Titley* might have brought a cross bill, and given notice to Mr. *Shepherd*, and put this matter in issue; but Mr. *Titley* has not done this, he cannot wrest the legal estate of Mr. *Shepherd*'s hands, unless he will pay off the judgment as well as the mortgage.

Mr. *Solicitor General*, counsel for the defendant Mr. *Titley*, made two points, and insisted in the first place, whether under the circumstances of this case Mr. *Shepherd* is to be allowed to tack the bond and judgment for 800*l.* in 1731, to his mortgage in 1725, against a puisne incumbrance by Mr. *Titley* between the year 1725, and 1731, Mr. *Titley*'s mortgage being dated the 24th of June, 1728.

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The ground, he said, the court goes upon in taking a subsequent security to a former one, is, that the court will presume the money was lent upon the faith of the original security.

What ground is there to presume that Mr. *Shepherd* lent this *l.* upon the credit of the original mortgage; the contrary is never to be presumed, because he might, if he pleased, have secured this further sum on the mortgage deed, without the trouble of a warrant of attorney, and entering upon judgment, which is a more round about way.

Lord Chancellor interrupted him, and asked if it was not a settled rule of this court, that the prior mortgagee may tack a judgment to his mortgage, though subsequent in time to a second mortgage, when he has no notice of the second mortgage (1).

A settled rule, that the prior mortgagee may tack a judgment to his mortgage, tho' subsequent

in time to a second mortgagee, provided he has no notice of the second.

Mr. *Solicitor General* gave it up, and went to his second point, between Mr. *Titley* and Sir *Thomas Peyton*.

The equity of redemption of Mr. *Jennings*'s whole estate is subject to Mr. *Titley*'s mortgage (2); and as that part of the estate mortgaged to Mr. *Shepherd* will in consequence of your ship's opinion, be but a scanty security to Mr. *Titley*, he has a right to come upon the fee-farm rents to make up his principal and interest, as they were included in Mr. *Shepherd*'s mortgage, whom Mr. *Titley* is at liberty to redeem, and therefore stands in all respects in the place of Mr. *Shepherd* with

(1) *Vide Blackston v. Moreland*, 2 Cha. 20. *Brace v. Marlborough*, 2 P. W. 1. *Anon.* 2 Vef. 662.

(2) *Vide Ex parte Carter*, Amb. 733.

SHEPHERD v. TITLEY. regard to Sir *Thomas Peyton*, as Mr. *Titley's* is a prior incumbrance; and for this purpose cited *Bovey versus Skipwith*, 1 Ch. Ca. 201.

Mr. *Attorney General* of counsel for Sir *Thomas Peyton*.

There is no foundation to alter the decree at the former hearing, nor is it open to the objection made by Mr. *Titley's* counsel; for the bill having been dismissed as against Sir *Thomas Peyton*, this cannot now be insisted on as an original objection, unless it was consequential, and a hindrance of justice.

The decree there was general, to take an account of what was due to Mr. *Shepherd* for principal and interest, and the whole 4000 *l.* was then supposed to be due.

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So that Mr. *Titley* was as much injured by the decree of dismissal of his bill against Sir *Thomas Peyton* then as he is now, and therefore, as it does not alter the situation of things, this cannot be called a consequential direction from that decree; nor can a single reason be given, why your Lordship should retain Mr. *Titley's* bill against Sir *Thomas Peyton* now, which might not have been equally given at the former hearing.

The fee-farm rents are not included in the mortgage to Mr. *Titley*: Will it be laid down then as a rule in this court, that an original mortgagee and mortgagor cannot sell a part of the mortgaged estate to a third person, notwithstanding an intervening incumbrance upon another part of the mortgagor's estate?

Mr. *Shepherd*, in his agreement with Sir *Thomas Peyton*, consented to take his principal and interest *first* out of the other part of the estate in mortgage to him, before he came upon the fee-farm rents, and therefore Mr. *Titley* can be in no better condition than Mr. *Shepherd* himself.

Sir *Thomas Peyton* has agreed that he will not prosecute Mr. *Jennings* for his breach of covenant, which is a valuable consideration in point of law, and upon which Sir *Thomas Peyton* might found an *assumpsit*, for it might happen, that by this forbearance his debt might be lost.

Mr. *Solicitor General* in his reply insisted, that Mr. *Shepherd* has not absolutely given up the fee-farm rents, but reserves to himself a power of resorting to them again, if the rest of the mortgaged premises should not be sufficient, and therefore Mr. *Shepherd* continues, to all intents and purposes, to have a mortgage still upon the fee-farm rents.

That the court will not, in case of Mr. *Jennings* the mortgagor, who has defrauded all the rest of the creditors, suffer such an agreement to defeat the right of a third person.

Mr. *Shepherd*, in his answer to Mr. *Titley's* bill, admits he had notice of Mr. *Titley's* mortgage six months before he signed the articles between him and Sir *Thomas Peyton*, therefore Mr. *Shepherd* has not parted with any security at all, but has the whole original debt for his security still.

To allow what is contended for on the other side, would be putting it in the power of a first creditor to direct the order of payment as to all the rest.

The

The articles for the purchase of the fee-farm rents between *r. Shepherd* and *Sir Thomas Peyton*; were in *April, 1732*, and *Titley's* bill was brought the *June* immediately following.

LORD CHANCELLOR,

The question now before the court is, Whether *Mr. Titley* is a right, as against *Sir Thomas Peyton*, to redeem *Mr. Shepherd*, and to have an assignment from him of his intire security, & by that means, to compel *Sir Thomas Peyton* to redeem him to the fee-farm rents.

As to the merits, I do not know how I can distinguish the case of *Sir Thomas Peyton* from any other puny incumbrancer or purchaser, where the rule of equity is, *prior in tempore, potius in jure*.

Sir T. P.'s case not distinguishable from any other puny incumbrancer;

for the rule is prior in tempore, potius in jure.

If, by the articles, *Mr. Shepherd* was to confine himself only to the other part of the mortgaged premises, and had not reserved power of resorting, at all events, to the fee-farm rents, if the first should not be sufficient, I should then have thought *Sir Thomas Peyton* had a strong case.

But, as this case is circumstanced, the question will be, Who *Mr. Shepherd* is a trustee for, as to the legal estate in the fee-farm rents, whether for *Mr. Titley*, or *Sir Thomas Peyton*?

It has been objected on behalf of *Sir Thomas Peyton*, that *Mr. Titley* is not right in point of form, and that he cannot, by the rules of the court, make this demand now, as it is so long since his bill was dismissed against *Sir Thomas Peyton*.

Let it stand over, therefore, to ascertain this fact, whether, when the cause was heard at the *Rolls*, the point between *Mr. Titley* and *Sir Thomas Peyton* was litigated then; for if it was, *Sir Thomas Peyton* may insist on the acquiescence of *Mr. Titley* under that decree, otherwise if *Mr. Titley's* bill was dismissed without any prejudice to this question.

Where there is a second suit between the same parties, you may insist on an acquiescence under a decree in the first, unless the bill be dismissed, without any prejudice to the question in that cause.

dismissed, without any prejudice to the question

Hall versus Carter, July 19, 1742.

Case 240.

JOHN Carter, by his will, dated *Jan. 25, 1685*, "created a term of 100 years, in trust, out of the rents and profits of the premises, or by mortgage thereof, to raise portions of 100*l.* for each of the daughters of his son *Thomas Carter*, payable at 18, or day of marriage; and moreover to pay every such daughter or daughters the sum of six pounds a year for their maintenance, till their respective portions shall become due and payable; with a proviso that it shall be lawful for his son *Thomas Carter* to make a jointure to such woman as he shall marry, of all or any part of the premises limited to him: and in case of failure of issue male of *Thomas*, the like limitation to his two other sons, *Cornelius* and *Henry*, with a proviso, that in case such person or persons, who shall be next in re-

Simple & full
3. 2. 8 & 12
in the Court of Chancery
Oct. 27. 1742.
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Sumption v. B. Hall
3. Dec. 17. 1742.

"mainder

HALL v.
CARTER.

“ mainder or reversion expectant upon the said term o
“ years, shall and will pay unto such daughter or daught
“ the said *Thomas Carter*, or their guardian, or to such
“ lawfully authorized to receive the same, all and every of
“ respective portions of 100 *l.* 2-piece, either before or aft
“ same are due and payable by the direction of this my
“ that then the said term of 100 years shall from thenc
“ cease and determine for the benefit of such person o
“ sons, in remainder or reversion as aforesaid.”

Thomas had two daughters, but no son, and left his
Ann Carter, who had a jointure of the whole premises c
under the will. *Cornelius Carter*, the second son of *J*
dead, but has left issue the defendant *Esfcourt Carter*,
tenant in tail under the will of *John Carter*.

The plaintiff *Grace Hall*, the daughter of *Thomas*
who married in *April*, 1724, 18 years ago, by her bill insit
is intitled to her portion of 100 *l.* and that it ought to be
even in the life-time of *Ann Carter*, her father's widow.

But her counsel at the bar, thinking it too hard to m
that the portion should be raised upon the jointress, g
that point, and insited only that the trustee may, by mort
the reversionary estate expectant upon the death of the joi
immediately raise the portions of 100 *l.* and 100 *l.* f
plaintiff *Grace*, and the defendant *Mary Paxton*.

Mr. *Brown*, for the plaintiff, cited *Butler versus Du*
1 *P. Wms.* 448. and *Brown versus Berkeley*, 2 *P. Wms.* 4
which went up afterwards to the House of Lords.

Mr. Attorney General, for the defendant *Esfcourt Cart*
tenant in tail, insited, that as the 6 *l.* a year maintenance
daughters, is to come out of the rents and profits, it must
that the gross sum of 100 *l.* is to be postponed till the com
ment of the term in possession, and that this brings it wit
reasoning in the case of *Brome versus Berkeley*: and th
trustees here, as in that case, having an election by sale or
gage to raise the portion, shews the intention of the testato
they should not exercise their election till the term comm
possession.

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LORD CHANCELLOR,

There have been a great many of these cases, but fo
years past I have heard nothing of them, which I hope is
to the rule being well settled in this respect: and there hav
likewise some cases formerly, which, by the ordinary
standing of mankind without doors, have been thought to
far.

The court, in
late cases, have
thought it hard
to raise daugh-
ters' portions in
the father's life-
time, and there-
fore refused to
do it.

Therefore, in more modern cases, the court has put a
tion, and thought it very hard, in the life-time of the said
incumber his estate with raising daughters' portions: and
instance they stopped short, and would not carry it so fa
cause it encourages undutifulness, and occasions impro
matches (2).

cases still more modern, another reason has prevailed in
 r of the remainder-man, that he should not be distressed by
 nbring the reversion too much, where the portion has been
 . *Vide* the case of *Greaves versus Mattison*, 2 *Jones* 201.
Staniforth and Clerkson versus Staniforth, 2 *Vern.* 460. taken
 e of in *Corbet & Ux' versus Magdwell*, 2 *Vern.* 640. by
Cowper, and since that several other determinations.

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 CARTER.
 In late cases,
 where the por-
 tion was large,
 the court have
 refused it, in fa-
 vour of the re-
 mainder-man.

the present case the demand is not in the life-time of the fa-
 but long after his death, which happened in 1721.
 ie question then is, Whether these portions shall be raised
 diately upon the reversion?

to the jointress, it is very clear that they cannot be so
 l as to affect her; for if the jointure had been limited by the
 tself, there could have been no doubt; and it is certainly
 ame thing when it is done by a power; and when *Thomas*
r, executed it, the estate out of the will of *John Carter*, and
 quently is precedent to the 100 years term for raising
 ons (1).

The portions
 cannot be raised
 in the life-time
 of the jointress,
 so as to affect
 her, for when T.
 C. executed the
 power, the estate
 rose out of the
 will of J. C. and is precedent to the 200 years term.

will of J. C. and is precedent to the 200 years term.

he second question is, Whether the portions are raisable out
 is term, though a reversionary one?

um of opinion, these portions ought to be raised immedi-
 , notwithstanding the cases cited; for this stands clear and
 ted of all the circumstances mentioned in the others.

here may be inconveniencies on both sides, but on the
 of the daughters a very great one, for they may wait till
 portions are of no use to them, as has happened in one
 ace here; for one of the daughters is dead, and her re-
 ntative comes only in her right.

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the case of *Corbet versus Maidwell*, 2 *Vern.* 640. Lord
 er admitted all the precedent cases, and went upon the
 ls of the settlement, *that in case the father should die without*
nale, and leave a daughter unmarried, or not provided for at his
, the trustees were to raise 2000 l. to be paid at 18, or mar-
. It was decreed not to be raised in the life of the father, it
elting till his death.

the case of *Butler and Duncomb*, the trust of the term was
 esly *from and after the commencement of the term*, and upon
 single words Lord *Macclesfield* founded his decree.

onveyancers now are grown so cautious, as to insert nega-
 words in settlements, to prevent portions being raised in the
 ime of the father and mother (2).

Conveyancers
 now insert ne-
 gative words, to
 prevent portions
 being raised in
 a father and mother's life-time.

a father and mother's life-time.

he case principally relied on, upon the part of the defendant
 rt *Carter*, is *Broome versus Berkeley*.

here was a reversionary term in that case, *in default of issue*
of the marriage, on trust to raise 2500 l. for daughters, payable
l. or marriage, and out of profits to pay 100 l. per ann. for

Ans 1 vol. 560. 2 *Ves.* 612. (2) 1 *P. W.* 458. 2 *P. W.* 99. 513. 2 *Ves.* 334.

maintenance,

HALL v.
CARTER.

maintenance; the first payment of maintenance money to be made such of the said half-yearly feasts as should next happen after the estate, so limited to the trustees as aforesaid, should take effect in possession: The power to raise the portions was out of the rents and fits, or by sale, or by leasing of the premises, and maintenance precede the portions. Lord Chancellor King, assisted by the Masters of the Rolls, was of opinion, that as maintenance was not to be till after the term takes effect in possession, a fortiori the portions not; and it would be absurd to say, that the portion should be first, and the maintenance money paid afterwards.

The cases are not at all alike, for there Mrs. Broome, daughter, was not intitled to have any maintenance till the took effect in possession.

The maintenance here is a present charge upon the estate, and is not postponed till after the term comes into possession, and no harm can arise from mortgaging the reversion, as the arrears must be satisfied the moment the term comes into possession.

But in the present case it is far otherwise, for the maintenance is actually a charge upon the estate, and trustees are to pay *per ann.* to each daughter, till their portions respectively be due and payable, and is not postponed till after the term comes into possession; so that maintenance runs on till then; though I do not know any instance where a sale has been directed for maintenance out of rents and profits, because it must be annual, which would create endless trouble, yet it is a charge on the estate, and the arrear which is incurred must be paid off when it comes into possession.

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Then, where can be the objection of mortgaging the reversion now; or what harm can it be to the reversioner; because the moment the term comes into possession, the arrears must be satisfied?

A power in trustees of raising portions by rents or by mortgage, is no reason for postponing the raising, in order

that they may make their election. An objection has been made by Mr. Murray, that the power being directed to be raised out of rents and profits, or by mortgage, therefore it ought to wait till the term comes into possession, trustees may make their election.

This was the argument in *Broome versus Berkeley*, but there are many cases of settlements where this election is given to trustees, and yet they shall not be allowed to postpone the raising in order to make their election only.

I am not clear, whether it might not be raised by sale, stood only upon the words *rents and profits*, which have been held to carry a fee (1).

The defendant cannot redeem the term, and exonerate the estate, without paying interest for the portions from the time they became due.

The next objection was, that if the court should be of opinion that the portion itself ought to be raised, yet that it shall not interest; and in order to support it, they have read the last proviso in the will, which says, that the term of 100 years shall not be void if such person as shall be next in reversion will pay the daughter's portions either before or after the same are due: and hence it is inferred that the defendant *Esfcourt* may redeem

(1) *Vide Okeden v. Okeden*, ante 1 vol. 550.

erim, and exonerate the estate at any time without paying interest.

HALL v. CARTER.

But I am of opinion that he cannot, but must pay the interest for the portions, from the time they became due; and that the intention of the testator was, that the daughters should have maintenance till the portions became payable, and interest afterwards till they were raised.

Though interest is not mentioned, yet in the case of *Lord Kilmurry and Geery*, 2 Salk. 538. it was held, that where there is a power of charging land with a gross sum, it imports interest of course, and none would lend such sum if the law were otherwise: this very rule prevailed afterwards in the case of *Evelyn* versus *Evelyn*, 2 P. Wms. 591.

Where there is a power of charging land with a gross sum, it imports interest of course (1).

I shall decree 18 l. to the widow, eight pounds to be paid her by the plaintiff *Grace*, as soon as her portion is raised, as a compensation for the three years maintenance till *Grace* was married.

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The trustee to have costs, but none between the other parties, and the portions to be raised by mortgaging the reversion expectant upon the death of the jointress.

(1) *Boycott v. Cotton*, ante 1 vol. 552.

Witty versus *Selwyn* and *Martyn*, at the second Seal after Trin. Term, July 20, 1742. Case 241.

THE plaintiff moved to stay the defendants from proceeding to trial at law upon a policy of insurance, and that a commission may issue for the examination of witnesses in the *West Indies*, on a suggestion that the material facts for the plaintiff arose there.

A commission prayed for examining witnesses in the *West Indies*, as the facts arise there, and to stay the defendant's proceeding at law on a policy; Lord Hardwicke granted the commission and the injunction, as the voyage was at and from *Carthagena* to *Porto Bello*, and the facts must necessarily arise in the *West Indies*.

ing at law on a policy; Lord Hardwicke granted the commission and the injunction, as the voyage was at and from *Carthagena* to *Porto Bello*, and the facts must necessarily arise in the *West Indies*.

LORD CHANCELLOR,

Where a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage, upon which it is insured, the insurer is liable (1); but if all thoughts of the voyage are laid aside, and the ship lies there five, six or seven years, with the owner's privity, it shall never be said that the insurer is liable; for it would be very absurd to make him answer for the whim or caprice of the owner, who chuses to let the ship lie and rot there.

Whilst a ship is preparing for a voyage, upon which it is insured, the insurer is liable; but if the voyage is laid aside, and the ship lies by for 5, 6, or 7 years, with the owner's privity, the insurer is not liable.

owner's privity, the insurer is not liable.

As this was a voyage at and from *Carthagena* to *Porto Bello*, the facts which are in controversy in this cause, must necessarily arise in the *West Indies*, and therefore the injunction must be granted, to stay the defendants the insured from proceeding at

(1) *Vide ante*, 1 vol. 548.

law

CHITTY V.
SELWYN.

law till further order, that the plaintiff may have an opportunity by a commission, to ascertain the facts which he insists on to be very material; that the ship lay above four years at *Carthage*, before it was sunk there by *Don Blasts*; and that all thoughts of proceeding on its voyage to *Porto Bello* were laid aside, there being no fair held, on account of the *English* fleet being in those seas, under the command of Admiral *Vernon*, and likewise the success he met with afterwards in his attack of that port.

I see no difference at all between this case and that of *Green* versus *Suaffs*, December 10, 1741 (1); and therefore will make the same order here, as in that cause; an injunction was granted accordingly.

(1) *Ante* 229. S. C. S. P.

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Case 242.

S. C. ante 237.
Lord Hardwicke
held, that the two
houses devised
under the will
were a redeemable
interest, and that
no bar arises from
the length of time.

Yates versus *Hambly*, July 21, 1742 (1).

admea. v. Reeve.
Kirkpelt. 258.
see Thomas
J. Collyer. 538.

THOMAS Talbot, being seised in fee of seven messuages in St. Thomas Apostle, subject to a mortgage term of 500 years, which afterwards became veited in *Edward Parker* deceased, who married *Alice*, *Thomas Talbot's* daughter; and which, by indenture of the 30th of *August*, 1695, was assigned to *Joseph Blunt*, in trust for *Edward Parker*, subject to redemption on *Thomas Talbot*, or his heirs, paying to *Edward Parker* 350*l.* Did, by his last will, dated 20th of *April*, 1698, devise two of the houses to his daughter *Mary*, afterwards the wife of *James Plummer*, and her heirs; and gave unto *Edward Parker* all the rest of the messuages, to hold to him and his heirs, he paying all his debts, and appointed him sole executor: Upon the testator's death, *Edward Parker* entered upon all the seven messuages: In 1699, *James Plummer*, and *Mary* his wife, exhibited their bill in this court against *Edward Parker* and others, to compel *Parker* to suffer the plaintiffs to enjoy the two messuages, according to the testator's will, or let them redeem the mortgage; but *Parker* dying soon afterward, having by his will appointed *Alice* his wife his executrix, who possessed the seven messuages, he entered into a treaty with *James Plummer* and his wife for ending the suit; and it was agreed, that *Alice Parker*, and the other daughters and co-heirs of *Edward Parker*, should, in consideration of 500*l.* and 10 guineas, release and convey to *James Plummer* and his wife, all their right in the seven messuages: *Plummer* and his wife having borrowed 50*l.* of *William Hambly* deceased, by lease and release, dated the 1st and 2d of *January*, 1699, and a fine, did convey the two houses devised to them to *William Hambly*, and his heirs, until he should have received by the rents and profits thereof, or be otherwise paid the 50*l.* with interest; and after payment by such rent of the 50*l.* then to the use of *James Plummer* for life, remainder to *Mary* his wife for life, remainder to the heirs of *James Plummer*, on the body of *Mary*, remainder to the

(1) *Reg. Lib. B.* 1741. fol. 334.

right

the heirs of *James Plummer*: *James Plummer* having informed *William Hamby* of the agreement for the purchase of the interest *Alice Parker*, and the co-heirs of *Edward Parker*, for 500*l.* and 10 guineas, and desired him to advance these sums for the benefit of *Plummer* and his wife, he did advance the money, to be applied accordingly; and it was thereupon agreed between *Hamby* and *Plummer*, that the mortgage should be assigned to a person in trust for *Hamby*, to prevent a merger of the term, and at the inheritance of the premises should be conveyed to the co-heirs of *Edward Parker*, to the use of *Hamby*, his heirs and assigns; but redeemable by *Plummer* and his heirs, on payment of principal and interest to *Hamby*: And the purchase money of 500*l.* and 10 guineas having been paid to *Alice Parker*, and the co-heirs of *Edward*, by indentures of assignment of the 28th of September 1702, *Alice Parker*, and the co-heirs of *Edward*, assigned to *Peter Hamby* the seven messuages for the remainder of the term of 500 years, in trust for *William Hamby*; and by lease and release of the 27th and 28th of September, 1702, *Alice Parker*, &c. conveyed the seven messuages to *William Hamby* and his heirs, in trust for *James Plummer* and his heirs, subject to the agreement between *Plummer* and *Hamby* of the 2d of January, 1699.

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James Plummer lived till 1710, and *Hamby* continued in possession of the seven messuages till his death in 1717, without ever accounting for the rents thereof, and *James Plummer* dying without issue, five of the messuages, subject to the mortgage, descended to *Timothy Plummer*, the brother and heir at law of *James Plummer*, who became intitled to the remainder in fee of the other two of the seven messuages which had been devised to *Mary Plummer*, and of which the fine was levied in 1699.

Timothy Plummer, in his life-time, conveyed all the seven messuages, for a valuable consideration, to the plaintiff, and *Timothy Plummer*, dying soon after, the plaintiff obtained administration, and insists he is become intitled to the equity of redemption, on payment of what remains due on the mortgages or securities to *William Hamby* deceased.

William Hamby the defendant, the son and heir of *Peter Hamby*, and grandson and heir of *William Hamby*, on his coming of age, had the possession of the seven messuages delivered to him, and is now in the receipts of the rents thereof; and by his answer insists, that his grandfather *William Hamby* entered on the seven messuages above thirty years ago, and that *James Plummer* and his wife were well satisfied they had received more money from *William Hamby* than the premises were worth, and never during their whole lives demanded any account of the rents and profits, and therefore, by virtue of the several deeds, the will of his grandfather, who has devised the messuages to the defendant for life, and his issue in tail, remainder to his right heirs, and the great length of possession in the premises, without any account demanded or given for the rents thereof, he insists that that he is absolutely

**YATES v.
HAMBLY.**

absolutely intitled in law to all the seven messuages, without rendering any account for the rents and profits thereof (1).

LORD CHANCELLOR,

The first question is, Whether a mortgage of two of the seven houses from Mr. James Plummer to Mr. William Hamby, is a redeemable interest or absolute.

It is very clear that the wife of *Plummer* was intitled to those houses subject to a mortgage made by *Talbot* her father; and on the 2d of *Jan.* 1699, *Plummer* mortgages the same estate for 50*l.* to secure this and all other sums advanced by *Hamby*.

This upon the face of it is plainly a mortgage, and *Hamby*, and those who claim under him, have been in possession ever since.

Now *Plummer* and his representatives are certainly intitled to redeem, had they come in a reasonable time.

Therefore the question will be, Whether it may be redeemed in 1740?

And I am of opinion, that the two houses are still a redeemable interest; and no bar arises from the length of time.

There is no doubt, but if this mortgage had been made in the common form, and subject to a forfeiture upon non-payment, the length of time would have been a bar, the courts of law and equity squaring their rules by the statute of limitations (2).

But this is a conveyance of the inheritance for securing the sum of 50*l.* or any other sum advanced by *Hamby*, in trust, that he should continue in possession till by perception of the rents and profits he shall be satisfied the principal and interest upon such sums as he hath already lent, or shall hereafter lend, and subject to this incumbrance to *James Plummer* for life, to his wife for life, and to the heirs of their two bodies; and in default of such issue, to the right heirs of *James Plummer*.

The mortgagee here was only in the nature of a tenant by elegit, and as soon as his principal and interest was satisfied, the estate ceased in *William Hamby*; and *Plummer*, or his representatives might have

Now there never could be a forfeiture under this deed, for the mortgagee was only in the nature of a tenant by elegit, and as soon as his principal and interest was satisfied, by being paid off, or by perception of rents and profits, the estate ceased in *Hamby*; and *Plummer* or his representatives might have maintained an ejectment; nor would any bar have arisen from a length of time, unless the statute of Limitations had run by the mortgagee's continuing in possession twenty years after the money had been paid off.

maintained an ejectment; nor, unless *Hamby* had continued in possession 20 years after the money had been paid off, could the statute of Limitations have run.

The plaintiff may come here for an account of the profits received, as in an

The plaintiff has certainly a right to come into this court for an account of the profits received: as in an *elegit*, the consor has a right to come here to see if the conseree upon the extended

elegit the consor has a right to see if the conseree, on the extended value, has received a satisfaction for his whole debt, and to have the surplus paid to him.

(1) The defendant denied there were any trusts declared in writing of the release of the 28th September, 1702. (2) *Aggas v. Fickeril*, *post.* 3 vol. 225.

value has received a satisfaction for his whole debt, and if there is a surplus, to have it paid over to him.

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I do not see this case at all differs from a *Welsh* mortgage, though I do not say but there are circumstances which may create a bar even in that case; but in common *Welsh* mortgages, on tendering principal and interest, they may come into this court or a redemption at any time (1).

In common *Welsh* mortgages, on tendering principal and interest the person intitled may come into this court for a redemption at any time.

The first objection was, that it is liable to all the mischiefs in common cases, and is a breach of the rule laid down in this court by way of analogy to the statute of Limitations.

But to this I answer, that in the present case here is nothing or the statute of Limitations to operate upon, for here is no forfeiture; indeed after the account is taken, if it should appear that the mortgage was satisfied by perception of profits twenty years ago, and that the mortgagee has continued in possession ever since, the statute of Limitations will run.

The second objection was, It is very unreasonable that a mortgagee should be a perpetual bailiff to the mortgagor (2).

That will not hold here, for the mortgagee takes the estate subject to a perpetual account; and this court ought not to relieve him from his own contract and agreement.

Where a mortgagee takes an estate, subject to a perpetual account, he will

not be relieved from his own contract.

Therefore I am of opinion the plaintiff is intitled to redeem upon the common terms of paying principal, interest, and costs, and to have an account of what has been received, and what remains due: and is not obliged to bring an ejectment for the possession, but shall have a decree for it here, after the mortgage reported to be satisfied.

The plaintiff intitled to redeem on the common terms, and not obliged to bring an ejectment for the possession,

but shall have a decree for it here.

It is like many cases in this court, where, though the party is a double remedy, he shall not be put to that expence; as for instance, in a bill brought for a discovery of assets, after they are discovered, the plaintiff shall not be turned over to a suit of law, but shall be decreed satisfaction for his debt here.

After assets are discovered, by a bill brought here; the plaintiff shall not be turned over to law, but decreed a satisfaction here.

As to the five houses, I am of opinion, the defendant, *Willm Hambley* is intitled to an absolute estate. though it is an exceeding dark transaction; but yet it is not proper to direct an issue to try a trust, nor do I remember any instance of it; for as it depends upon the statute of Frauds and Perjuries, it is incumbent upon this court to determine it; and therefore the bill must be dismissed as to any relief prayed with regard to five of the seven houses in question.

[364] Lord Hardwicke held the defendant intitled to an absolute estate in the five houses, and dismissed the bill with regard to any relief prayed as to them.

(1) *Orde v. Heming*, 1 Vern. 418. 360. *Lawley v. Hooper*, post. 3 vol. 280. *Wood v. Price*, Prec. Cha. 423. 1 P. (2) *Vide post*. 496.
1891. S. C. *King v. King*, 3 P. W.
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But I declare, according to the terms of the mortgage deed, the plaintiff is intitled to the redemption of *the remaining two houses*, and direct the Master to take an account of the *rents of the two houses* received by the defendant or *William Hamblt the mortgagee*, and such rents to be applied in paying the interest, and then in sinking the principal, and upon the plaintiff's paying to the defendant what shall appear due to him for principal, interest, and costs, the defendant is to re-convey the said mortgaged premises to the plaintiff, and deliver possession to him accordingly.

Case 243.

Smith versus W'yat, July 21, 1742 (1).

Potatoes being
sown in great
quantities in a
common field
the rector

brought his bill for them as a great tithe. *Lord Hardwicke held, potatoes being in their nature a great tithe, the sowing them in greater quantities makes no alteration.*

THE bill was brought by the rector of a parish in *Essex* for the tithes of potatoes sown in great quantities in the common fields, and therefore claims it as a great tithe.

The defendant, the vicar, insists, that notwithstanding it is sown in fields, it still continues a small tithe, and the quantity makes no difference.

Mr. *Clark*, for the plaintiff, cited *Hutton* 77. *Cro. Car.* 28. *Wharton* versus *Lisle*, in 4 *Mod.* 183. 3 *Lev.* 365. and *Carth.* 263. and *Degg's Pars. Couns.* 177. in order to shew that the quantity made a difference, and that when potatoes are sown in gardens it is a small tithe, but when in fields a large tithe.

The cases cited by the defendant's counsel to prove it a vicarial tithe were *Parry* versus *The Bishop of London*, *Hil.* 1705. *Wallis* versus *Pain et al'*, *February* 8, 1738. The *Attorney General* said, it would be a great inconvenience to the people of *England* if the rule which they have laid down for the plaintiff should be established, that quantity will denominate it to be a great tithe.

LORD CHANCELLOR,

The question is, Whether potatoes, planted in fields, are great or small tithes.

[365]

Potatoes in their nature are small tithes; then the question will be, whether they receive any alteration of their right by cultivating in greater or smaller quantities.

The distinction
between great
and small tithes
might arise at
first from the
former producing
greater, and the
latter smaller quantities.

When the distinction of great and small tithes was at first settled, probably it was upon this foundation, that the former yielded tithes in greater quantities, and the species of tithes which were called small produced but in small quantities.

Though it might be arbitrary at first, yet it has grown into a rule, and fixed so for the sake of certainty; nor is there any

(1) *Reg. Lib. B.* 1741. fol. 488.

authority cited, where it is said to be determined, that the rule of tithes shall depend upon the quantity, and not upon the nature.

SMYTH v.
WYAT.

In the case of *Udall and Tindall*, Cro. Car. 28. and in *Hutton* 3. it is so laid down indeed, but there was no judicial determination. And in *Wharton versus Lisle*, 3 Lev. 365. and *Mod.* 41. Ld. Ch. Just. Holt did hold that the tithes should be determined whether great or small from their quantity and not from their nature, but the judgment was contrary.

Though Ld. Ch. Just. Holt in *Wharton versus Lisle* held tithes should be determined whether great or small from their quantity, the judgment was contrary.

If this sort of roots should be called small tithes when planted in gardens, and great when planted in fields, it would introduce the utmost confusion, and must vary in every year in every parish.

If potatoes in gardens should be called small tithes and great in fields, it must vary every year in every parish.

If the quantity will turn small tithes into great, why will it not turn great tithes into small, when the quantity of great tithes is small.

An objection has been made, that if this rule should hold, it would put it in the power of the occupier to change the property.

To which I answer *so it will*, for tithes are a fluctuating uncertain inheritance, and depend upon the course of husbandry; a man may turn arable into pasture, and then the tithe being a giftment, is become a small tithe from a great one.

Where arable is turned into pasture, it is an agiftment tithe, and become a small one from a great one.

Therefore I think as there is no judicial determination against it, I am warranted in my opinion, that the tithe of potatoes is small tithe; and his Lordship decreed accordingly.

The Earl of Coventry versus Coventry, July 22, 1742.

Case 274.

THE question, in this case, arose upon the will of *Thomas Lord Coventry*, made in 1698, whether the testator, by his words, has disposed of a manor called *Twignore*, to the plaintiff; for if he has not, the defendant insists, he is intitled to it as heir at law.

[366]
S. C. 1 Vef. 404.
S. C. 2 Vef. 564.
60. 625.

Thomas late Earl of *Coventry*, being in his life-time seised in fee of the manor of *Twignore*, in the county of *Lincoln* "did by his will devise his freehold manors of *Great and Little Milton*, in the county of *Oxford*, to his wife *Elizabeth* for her life, remainder to trustees and their heirs, to the use of his first and other sons in tail male, remainder to his son, *Thomas Lord Deerbury* for life, and to the use of his first and other sons in tail male, remainder to testator's son *Gilbert* for life, and to his issue male, remainder to testator's uncle *Francis Coventry* for life, and his issue male, remainder to *William Coventry* and his issue male, remainder to *Thomas Coventry* for life,

Earl of
COVENTRY v.
COVENTRY.

"life, and his issue male, remainder to *Henry Coventry*
"his issue male, remainder to testator's right heirs
"he thereby willed, *that the manor or Lordship of T*
"should be exchanged for the inheritance of the prebend
"Milton, in Oxfordshire, which he held by lease, and
"same should be done by act of parliament; and that the in
"of the said prebend manor, after his death, may be kept in
"and family, he gives to *Thomas Lord Deerhurst* and *G*
"ventry, and two others, and to their heirs, the n
"Twigmore aforesaid, and also the manor of *Milton*,
"the said manor of *Twigmore* to them, their heirs an
"for ever, to the uses in this his will, and to hold the
"manor of *Milton* unto the same trustees, their execut
"for and during the term of years he had therein, an
"tenant right of, in and to the same, to the end such
"might be made by act of parliament as aforesaid, as
"may be after his decease, it being his will to be a be
"to the church of *Lincoln*; nevertheless it was his
"the trustees should permit his said wife *Elizabeth* to e
"manor of *Twigmore*, and prebend manor of *Milton*,
"receive the rents to her own use untill such exchange
"made, and did also direct, that as soon as such exchan
"be perfected, that the said prebend manor of *Milto*
"be settled upon his wife for life, and after to his is
"on the body of the said wife in special tail, with rema
"the same persons to whom he had limited *Great* an
"*Milton*."

Thomas died soon after he made his will without issue
his body, by *Elizabeth* his then wife, and leaving issue b
mer venter two sons, *Lord Deerhurst* and *Gilbert*, both fir
without issue, and *Thomas Coventry* is also dead witho
male; *Elizabeth* Countess of *Coventry* died in 1724; upo
death the manor of *Great* and *Little Milton* vested in th
tiff for life, with remainders as before mentioned.

Gilbert Coventry survived the other three trustees, an
daughter only, who married *Sir William Carew*, and by l
the defendant, *Coventry Carew*, who is heir at law both
bert, the surviving trustee, and likewise of *Thomas*, the t

If no exchange can be made, the plaintiff insists the n
Twigmore ought to be settled upon him for life, with re
as of *Great* or *Little Milton*, being the intention of the te
exchange could not have been made, and that defendan
to convey the manor of *Twigmore* to some new trustee,
act of parliament can be obtained.

The defendant, *Sir William Carew*, for himself, and s
dian for his son, says, that *Lady Ann Carew* his wife, d
of *Gilbert Coventry*, dying, seized in fee of the said m
Twigmore, and leaving *Coventry Carew* her son and heir
defendant, he is intitled to hold and enjoy this manor as
by the curtesy, and that *Coventry Carew* his son is intitled
reversion in fee as heir at law of the testator, and like
Gilbert Coventry.

The *Attorney General* for the plaintiff cited the case of *Noy* Earl of
COVENTRY v.
COVENTRY. *versus Mordaunt*, 2 *Vern.* 581. and the *Attorney General* *versus Fiennes*, February 20, 1738.

For the defendant Mr. *Murray* cited the case of *Burgoyne* *versus Benson*, the 12th and 13th of *May*, 1738, before Lord *Hardwicke*, and *Bellasis* *versus Compton*, 2 *Vern.* 294.

LORD CHANCELLOR,

This comes before the court upon a bill brought by the present Lord *Coventry*, to have the benefit of an estate by way of trust, called *Twigmore*, in *Lincolnshire*, for himself, and for those who claim under the will of *Thomas Lord Coventry*.

By the will it appears the testator's intention was to secure estates in possession and reversion not only to his lineal, but the collateral branches of his family; for the introductory clause of his will shews plainly his intention to settle his whole estate (1).

The testator was seised in fee of two manors, one called *Great Milton*, and the other *Little Milton*, and likewise of a leasehold estate called the prebend manor of *Milton* under the church of *Lincoln*, and of a freehold manor called *Twigmore* near the city of *Lincoln*.

He devises his manors of *Great Milton*, &c. to his wife *Elizabeth* for her life, remainder to trustees and their heirs, to the use of his first and other sons by *Elizabeth* in tail male, &c. *vide the will*; then takes up the consideration of the prebend manor of *Milton*, and manor of *Twigmore*.

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Thomas, the testator, died soon after.

The countess his second wife became intitled to both these manors, till an exchange could be made; and during her life no exchange was ever made, nor since her death, and it is admitted the leasehold estate is at an end, for it was never renewed.

Gilbert Coventry, second son to the testator by the first venter, was the surviving trustee of these manors: he died without issue male, and left one daughter, who was his heir, and married the defendant Sir *William Carew*; so that the defendant *Coventry Carew*, her son, is the heir at law of the surviving trustee, and of *Thomas Lord Coventry* the testator.

The church of *Lincoln* refuse to make the exchange; therefore the bill is brought for the making the exchange; and if the plaintiff is not intitled to that, he prays that he may at least have the manor of *Twigmore*.

Against this latter relief, one general objection, made in behalf of *Coventry Carew*, that he is the heir at law of the testator, and the plaintiff who claims under the will stands in no other light before the court than as a volunteer; and therefore a court of equity ought not to interpose, but where the law has placed the estate, there it ought to remain.

But this objection will not hold here; for *Coventry Carew* must take as a devisee, or not at all, for the testator did not leave any thing to descend but appointed trustees of all his real estate.

(1) See note to *Ridout v. Pain*, *post.* 3 vol. 486. as to the effect of introductory words in a will.

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COVENTRY.

And it is by mere accident it comes to *Coventry Carew* as heir at law to the surviving trustee *Gilbert Coventry*, and therefore shall make no more alteration than if it had fallen to the representative of any other trustee.

When there is a limitation to a trustee, though the legal estate vests in him, yet it is incumbent upon this court to declare who shall have the beneficial interest, or otherwise trustees would have the estate themselves.

The first question, What is the intention of the testator, and the construction of the will ?

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It appears to me, his intention was, that a new purchase should be made of the prebend manor of *Milton*, for particular uses, viz. a provision for his younger children, and afterwards that the inheritance should go over in remainder to *Thomas Lord Deerbury*, &c. in order to keep the prebend manor of *Milton* in his name and family: this was his original and primary view.

A secondary view was, to benefit the church of *Lincoln*, by giving them an estate near *Lincoln*, and an estate of inheritance in possession, in lieu of the prebend manor of *Milton*, provided an act of parliament could be procured.

The second question is, What would have been the effect of the exchange, had it been completed ?

As to this, I am of opinion, the plaintiff, and those who claim under him, would not have taken by devise, but by virtue of the exchange from the prebend manor of *Milton*.

Suppose the exchange had been defeated by an eviction of the prebend manor, the person who had lost the manor of *Milton* must have *Twignore* back again, and not the heir at law: and the trustees would certainly have been trustees for the *cessuy que trust* of the prebend manor of *Milton*.

In exchanges it is not clear, on an alienation by one party, and an eviction, whether the heir or the alienee should enter.

It is not clear in the law of exchanges, if there is an alienation by one of the parties, and there is an eviction, whether the heir at law or the alienee should enter (1); therefore this estate must be taken to be subject to the same trusts as the estate in exchange would have been.

The third question is, What is the equity that results, now the exchange is not made, or perhaps never will, which the testator seems not to have had in his contemplation.

Where money is given to be laid out in lands, and when bought, to be settled on such and such persons, on a bill brought here, the course is to direct a purchase, and the profits of the money to go as the land itself, till purchased.

The equity is very plain; where a sum of money is given by the will of a testator to be laid out in the purchase of lands, or lands in a particular county, and after they are bought to be settled upon such and such persons: if a bill is brought here, the constant ordinary course is to direct a purchase, and the profits of the money to go as the land itself, till purchased.

(1) *Vide* *Busard's case*, 4 Co. 121. a. b.

comes very near the present case; I would put these Suppose there was a direction by a will to purchase a particular estate, which is swallowed up by an inundation, as happens in *Essex*; or suppose the will was to purchase an estate in country, and it cannot be procured, what is the consequence; shall the money so devised to be laid out go to the executor? No surely; but it shall go in such a manner as the rents and profits would do when the land is purchased: now I do not see any difference between directing an estate to be given in exchange; and directing his manor of *Twignmore* to be sold and the proceeds put into money, and applied for that purpose. *Twignmore* is devised to trustees for the uses, &c. *vide the will*: the court must make such construction as will in the first instance effectuate the purchase.

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COVENTRY.
Suppose a direction by will, to purchase an estate, which is afterwards swallowed up by an inundation, the money so devised shall not go to an executor, but as the rents and profits would have done when the land was purchased.

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her objection has been made, that the profits from and after the exchange should be made, is an interest undisturbed (1), and was compared to Lord *Weymouth's* case. I think it is not at all like that case, for there the profits were actually undisposed of; here the whole fee is given to trustees for the use of particular persons, and for particular purposes.

carried too far, when it is said, no exchange can ever be made for there is no time fixed for it, and therefore there may be a prebendary at *Lincoln* who may consent to the exchange.

her objection was made, that supposing the leasehold estate prebend manor had been kept full, and to this time, the fee could not have taken both the estates.

her objection seems very specious at first, but will not weigh in the present case; for I own I am not satisfied, whether the fee would not have been intitled to both.

as to the cases.

that I ground myself upon is, considering this in the light of the case, which distinguishes it from all the cases, and brings it to a common equity.

the case of *Burgoyne* versus *Benson*, relied on chiefly for the present, is attended with such variety of circumstances that it can never be a precedent for this or any other.

on the whole, I am of opinion, that the plaintiff is intitled to the manor of *Twignmore*, and must decree the possession accordingly (2).

Tide Hill v. Bishop of London, ante p. 19.

His Lordship declared, that the manor of *Twignmore* being devised by the will of *Thomas* late of *Coventry*, as and for the consideration of the exchange or purchase by said testator to be made of the inheritance of said prebend manor of *Milton*, in exchange or purchase not taken effect, the said manor of

Twignmore ought to go and be enjoyed by such persons and to such uses as the inheritance of the said prebend manor ought to have gone in case such exchange or purchase had been completed. *Reg. Lib. A. 1741. fol. 775.* Upon the same principle seems the following determination: a real estate is devised, and after the testator's death the devisee is evicted: damages are recovered by virtue of a covenant in the original purchase

chase deed: the devisee (and not the heir) shall have the damages in lieu of the estate devised. *M'kenzie v. Robinson*, cited 2 *Ves.* 60. 625. *Vide Selwyn v. Hargrave*, 2 *Ves.* 57. *Whitaker v. Whitaker*, 4 *Bro. Cha. Ca.* 31.

Case 245.

Howard versus Hopkyns, July 21, 1742 (1).

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A proviso in articles for the purchase of an estate, that if either should break the agreement he should pay 100*l.* to the other; the defendant, on being offered two years purchase more, accepted it, notwithstanding his agreement. *Lord Hardwicke decreed a specific performance of the articles.*

THE plaintiff has brought this bill for a specific performance of an agreement.

The plaintiff and defendant executed articles for the purchase of an estate; there was a proviso in it, that if either side should break the agreement, he should pay 100*l.* to the other: the defendant afterwards met with a third person, who offered him two years years purchase more than the plaintiff, upon which he immediately accepted of it, notwithstanding his agreement with the plaintiff.

It was insisted by the defendant, that the plaintiff had been a tenant for himself several years of this very estate, and that he depreciated the value of it, and made a false representation in order to keep off others, and to secure it to himself, which is a fraud in the plaintiff, and therefore the defendant ought to be relieved from this bargain.

It was insisted likewise, that it was the intention of the plaintiff and defendant, that upon either paying 100*l.* the agreement should be absolutely void.

LORD CHANCELLOR,

The offering to pay the stipulated sum will not vacate the agreement, for it is no more than the common case of a penalty.

A penalty has never been held to release parties from their agreement, for tho' incurred, they must perform it notwithstanding.

As to the defence of the stipulated sum, I cannot take this, to let off either party when they please, but is no more than the common case of a penalty, for it might be inserted by the plaintiff in order to be paid for his trouble of viewing and measuring the estate, taking plans, &c. supposing the defendant should not be able to make out a title.

In all these cases where penalties are inserted in a case of non-performance, this has never been held to release the parties from their agreement, but they must perform it notwithstanding.

Indeed if there had been evidence, which had proved a misrepresentation of the farm by the plaintiff to a gentleman who had a desire of purchasing it, that would have been a reason for setting aside the agreement, and would have rebutted the equity the plaintiff has of a specific performance of the agreement.

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But the proof does not come up to this, nor is the person, who is pretended to have dropped the purchase of the estate merely upon the false suggestions and misrepresentations of the plaintiff,

mined as to this fact, and therefore I must decree a specific performance of these articles.

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As to the increase of purchase money given by the defendant Norwood to the defendant Hopkyns, which must now be refunded he defendant Norwood, he can receive no more from the plaintiff than the sum agreed to by the articles, but I cannot make decree as between co-defendants, unless I have their consent, therefore shall leave this matter open.

Ulrich versus Litchfield, July 23, 1742.

Case 246:

Question arose in this cause upon the will of Mary Paravacini.

M. P. gave her real and personal estate to the plaintiffs, equal-

between them; and on the death of one of them, the whole estate to James Ulrich in tail; and for the issue, to Richard Ulrich in fee, with a few pecuniary legacies, and charged her real estate with the payment, if the personal estate should not be sufficient; and by her will declared she gave all the residue of her personal estate to her uncle Leonard Collard's three daughters.

He counsel for the residuary legatees offering to read the parol evidence of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of Leonard Collard: Lord Hardwicke said, this was not a case where parol evidence can be read, though there were some things here which might make a Judge wish to admit it (1).

She bequeathed her real and personal estate to the plaintiffs Elizabeth Travers and James Ulrich, equally between them for life; and upon the death of Elizabeth Travers, she gave the whole estate to James Ulrich, in tail general, and for want of such issue, to Richard Ulrich in fee, with a few pecuniary legacies, and charged her real estate with payment of these legacies, if her personal estate should not be sufficient; and by her will declared she gave all the rest and residue of her personal estate to her uncle Leonard Collard's three daughters; and particularly gave to Mrs. Susanna Litchfield 10l. and made her executrix.

Mr. Wilbrabam, for the residuary legatees, insisted, that the residue of her personal estate, must mean the residue after the particular legacies are paid off; and could not refer to the beginning of the will, because there a fee is devised, and consequently testatrix has disposed of the whole: that parol evidence in this case may be admitted of the attorney who drew this will; that he had express directions to give the personal estate to the three daughters of Leonard Collard, that to be sure, things which quite contrary to the will, shall not be proved by parol evidence, but that it may be allowed to explain words in a will, especially in this case, where it appears to be merely a blunder of the drawer: he cited the case of Pendleton v. Grant, Eq. Cas. r. 231. and Hodgson v. Hodgson, 2 Vern. 593.

King v. Badley
2 M. & K. 417
Clementson
quidly.
Hees. 308
Henrich v. Bentley
2 M. & K. 149
Hall v. Hall
1 Ott. & Warren
94
Starr v. Barrack
2 M. & K. 36
Howden v. Howden
11. 2. 18. 466

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(1) Parol evidence can never be admitted to contradict the will. Brown v. Win, Ca. temp. Talb. 240. Chamberlain v. Chamberlayne, 2 Freem. 52. Low-

field v. Stoneham, 2 Stra. 1261. Hampshire, v. Peirce, 2 Ves. 217. Maybank v. Brook, 1 Bro. Cha. Rep. 84.

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In the present case, he said, it does not intrench upon any of the rules, with regard to parol evidence, but only clears up who was intended to have the personal estate, where the whole is devised to two different persons; and that it seems clearly to be a blunder in the drawer of the will, because the devise in the first part of it is proper only in the disposing of real estate.

LORD CHANCELLOR,

It has been held, where there has been a devise of an estate to A. at the beginning, and to B. at the end of a will, they shall take as jointenants.

Where there is a devise of an estate to one person at the beginning of the will, and a devise of the same estate to another at the end of it, there have been determinations that they shall take as jointenants (1).

The consideration before me is as to the personal estate.

There are two questions:

First, Whether I ought to admit parol evidence to explain the intention of the testator.

Courts of law and equity admit parol evidence in two cases only, to ascertain the person, where there are two of the same name, or where there has been a mistake in a Christian or surname, and in resulting trusts relating to personal estate; as where an executor has a small legacy, and the next of kin claim the residue, there parol proof is admitted to ascertain who was to have it.

And as to this, I am of opinion, it is not a case in which parol evidence can be read, and would be of dangerous consequence; it is true, there are some things here which would make a judge wish to admit it; but I must not follow my inclinations only, for I do not know, that upon the construction of a will, courts of law, or equity, admit parol evidence, except in two cases: first, to ascertain the person, where there are two of the same name, or else where there has been a mistake in a Christian or surname (2), and this upon an absolute necessity, as in *Lord Cheney's* case, where there were two sons of the name of *John*, 5 Co. 68. and if the court had not let in such evidence, it would have made the will void, notwithstanding there was such a person as *John*, &c. and the doubt was only which of them was meant, and notwithstanding too the heir at law was clearly disinherited.

The second case is, with regard to resulting trusts relating to personal estate; where a man makes a will, and appoints an executor with a small legacy, and the next of kin claim the residue.

In order to rebut the resulting trust for the next of kin, in the case of *Littlebury v. Buckley*, Eq. Cas. Abr. 245. and the *Countess v. the Earl of Guinsborough*, 220. Parol proof was admitted to ascertain the person who was to have the residue (3).

(1) *Bennet's case*, Cro. Eliz. 9. *Coke v. Bullack*, Cro. Jac. 49. 3 Leo. 11. *Wallop v. Darby*, Yel. 210. *Har. Co. Litt.* 112. b. n. 1. *Ridout v. Payne*, 19th. 3 vol. 493.

(2) *Harris v. Bishop of Lincoln*, 2 P. W. 135, 137. *Anon.* 2 Eq. Abr. 415. Pl. 6. *River's case*, ante 1 vol. 410. *Baylis v. the Attorney General*, ante 239. *Castleman v. Tarnur*, post. 3 vol. 258. *Goodridge v. Goodridge*, 1 Ves. 231. *Stamshaw v.*

Pierce, 2 Ves. 216. *Dawson v. Sweet*, Amb. 175. *Bradwin v. Harper*, Amb. 374. *Parsons v. Parsons*, Ves. jun. 266. *Jesside Del Mare v. Rebello*, 3 Bro. Cha. 446. So parol evidence has been admitted to ascertain the thing devised. *Hodgson v. Hodgson*, 2 Vern. 593. *Penaleton v. Grant*, 2 Vern. 517. *Fennell v. Poyntz*, 1 Bro. Cha. Rep. 472.

(3) See *Reefbridge v. Wadsworth*, ante 69. *Walker v. Walker*, ante 99.

is very true, cases may be cited where Lord Cowper has admitted such evidence; for he went upon this ground, that it was necessary of assisting his judgment, in cases extremely dark and doubtful (1).

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have the greatest deference for his judgment, but must own as never satisfied with this rule of Lord Cowper's, of admitting parole evidence in doubtful wills: besides, he went further in the great case of *Strode v. Russell*, 2 Vern. 621. in which there was an appeal to the House of Lords; Mr. Justice Tracy, who cited Lord Cowper in that cause, was at first of the same opinion with him, but, upon considering it more, disavowed his opinion, and was clear that it could not be admitted; and his alteration in his judgment was mentioned in the House of Lords.

Lord Hardwicke not satisfied with Lord Cowper's rule of admitting parole evidence in doubtful wills. Mr. Justice Tracy, who assisted Lord Cowper in *Strode v. Russell*, was at first of the same opinion with him, but on consideration,

clear the evidence could not be admitted: and his alteration of judgment had weight in the House of Lords.

In the case of *Selvin v. Brown*, *Cases in the time of Lord Talbot*. I was of opinion that it ought to have been admitted; and Lord Talbot, when he had heard the cause, had a remorse of judgment at the same time he rejected the parole evidence; but the House of Lords refused it as of most mischievous consequence, and affirmed the decree.

In *Selvin v. Brown*, Lord Hardwicke said he was for admitting it. Lord Talbot, who had a remorse of judgment at the same time, rejected it.

rejected it; but the House of Lords refused it, and affirmed the decree.

tem, *I give to John* — 10l. and several legacies to others, then disposes of all the rest and residue.

There is undoubtedly a contradiction and repugnancy in the words; for in the first place she has given all her personal estate to the plaintiff, and yet legacies come afterwards, and a devise of the residue.

What then must be the construction.

As to the general question, where the same thing is described verbally, and given to two different persons in the former and latter part of a will, Lord Coke was of opinion, the latter words shall revoke the former; but in *Plowden*, in the case of *Paramore and Yardley* (2), it is said, they shall take as jointenants: and the reasoning in *Plowden* is not convincing to me, but rather incline to Lord Coke's (3), though the latter cases have taken otherwise (4).

Where the same thing is given in a will to two different persons, Lord Coke said the latter words shall revoke the former; but in *Plowden*, in the case of *Paramore and Yardley*, it

said they shall take as jointenants; but Lord Hardwicke said, he rather inclined to Lord Coke's opinion.

But no certain rule is to be laid down as to construction of devises; and so says Savinburne in the 7th part, chap. 21. but they must depend upon their particular circumstances.

(1) *Docksey v. Docksey*, 8 Vin. 195.

(2) *Hampshire v. Pierce*, 2 Vef. 216.

(3) *Boyd*, 2 Bro. Cha. Rep. 521.

(2) *Plowd.* 539. S. C.

(3) *Co. Litt.* 112. b.

(4) *Supra* 373, note 1.

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Where a man gives a horse to *A.* in the first part, and in the latter end the same horse to *B.* it is a revocation, and *Swinburne* is mistaken in point of law, in saying they shall take as jointenants.

In the case of a simple legacy, if a man makes a will, and gives a horse to *A.* in the first part and in the latter end of it gives the same horse to *B.* it is a revocation of the former legacy, and therefore *Swinburne* is mistaken in point of law.

Upon the whole of what *Swinburne* says, the result is this, That if the same thing be given to two persons, they shall take as jointenants, unless there is something to indicate and prove the intention of the testator to revoke and vary the devise.

Now try the present case by this rule, and see if it does not come exactly within it.

The testatrix, by giving legacies after the devise of all the personal estate, has varied the will *pro tanto*.

It is truly said that a man may give the whole in a former part, and qualify it afterwards, and still the first legatee is intitled in part.

The testatrix's charging the real estate with the legacies, if the personal is not sufficient, shews her intention in one event totally

But here, in case the whole personal estate should not be sufficient to pay the legacies, she charges the real estate with them, upon a supposition that the other might not be sufficient, and therefore is a plain indication of her intention in one event totally to revoke the devise of the personal estate.

to revoke the devise of the personal; and there being an alteration of her intention before she finishes her will, the construction is, she has altered her intention throughout, and the plaintiff is not intitled to any part of the personal estate, but the residue belongs to the three daughters of *Mr. Leonard Collard*; and *Lord Hardwicke* decreed accordingly.

Then it must be admitted that here is an alteration of her intention, as to this devise before she finishes her will.

Afterwards she says, *I give all the rest and residue of my personal estate to my uncle Leonard Collard's three daughters.*

What is the construction then? Why that the testator has made an alteration in her intention throughout.

Mr. Brown would endeavour to find out a rest or residue, notwithstanding all the personal estate is given away to the plaintiff; and that is supposing the plaintiff had died in the life-time of the testatrix, then it would have sunk into the residue as a lapsed legacy, and the three daughters of the uncle would have been intitled under the devise of the rest and residue.

But this will not hold; for when a person makes a will, and gives particular legacies, it is not supposed to be in the view of the testator that legatees will die in his life-time, nor does he provide for that accident; and this is the reason it is called a lapsed legacy, because the testator had it not in view at the time of the will.

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Fane v. Fane, 1 *Vern.* 30. is strong to this point.

Upon the whole, I am of opinion the plaintiff is not intitled to any part of the personal estate (1).

Saltern versus Saltern, July 24, 1742.

Case 247.

THE words of the will upon which the question arose were, "I give unto my grandson also a lease that I did take being part of the lands called *Barton*, unto *John Saltern* and his heirs, but if he shall happen to die without heirs, of his body, then he devises it over."

Where there is a devise of a lease for years to a man, and if he die without issue remainder over, the whole interest vests in

the first taker; otherwise if a lease for lives, for if the first taker makes the use of his power, on his death it vests in the remainder-man, who takes as a special occupant.

It was said by counsel, that a devise to a man generally and for fee of a chattel interest, and if he die without issue, or if he die without heirs of his body, remainder over, that it shall be construed in this court to mean a dying without issue at the time of his death.

LORD CHANCELLOR,

I know of no such rule; for in those cases where the court has restrained it to a dying without issue at the time of the death of the first taker, it has arisen from some other words, which shew the intention of the testator to confine it to such a dying without issue (1).

Where there is a devise of a lease for years to a man, and if he die without issue remainder over; there is no doubt but the whole interest vests in the first taker (2); otherwise if it had been a lease for lives, for there the first taker had a power over it only during his own life to have disposed of it, but if he makes no use of that power, immediately upon his death it vests in the remainder-man, who takes as a special occupant (3).

(1) *Vide Beauclerk v. Dormer*, ante 314.

(2) *Vide Hudson v. Buffey*, ante 89. note 1.

(3) *Low v. Burron*, 3 P. W. 262. *Stuke of Grafton v. Hammer*, 3 P. W. 16. note E. *Baker v. Bayley*, 2 Vern.

225. *Wasteneys v. Chappel*, 1 Bro. P. C.

457. *Notion v. Frecker* ante 1 vol. 524. *Forster v. Forster*, ante 259. *Williams v. Jekyll*, 2 Ves. 681. *Blake v. Blake*, 3 Cox's P. W. 10. note 1. *Har. Co. Litt.* 20 a. note 5.

Hodgworth versus Crawley, July 26, 1742.

Case 248.

A Devise to trustees of a sum of money to be laid out in the purchase of an annuity clear for A.

A devise of an annuity clear for A. means free from taxes.

LORD CHANCELLOR,

I must direct the trustees to lay it out in the purchase of an annuity free from taxes, which is the proper meaning of the word (1).

1) So *Brewster v. Kitchell*, 1 Salk, 1. 1 *Ld. Raym.* 317. *Bradbury v. Light*, Dougl. 602. *Blandford v. Marlb. Magb.* 298. 542. *Contra Green v. Mary-*

gold, 8 Vin. 411. *Tyrconnel v. Ancester*, 2 Ves. 500. *Dacosta v. Villareal*, 1 Bro. Cba. Rep. 4. note. *Vide Nicholis v. Lee-fer*, 298. 3 vol. 573.

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v. CLARK.

court, because they have a jurisdiction on account of the personal estate disposed of by it.

I wish gentlemen of abilities would take this inconvenience and absurdity into their consideration, and find out a proper remedy by the assistance of the legislature.

But, as the law stands at present, it is not in the power of this court to interpose, so as to stop the proceedings in the ecclesiastical court.

The testator has left a very large personal estate, but has not trusted Mr. Clark alone, for he has appointed three more trustees, who have a joint power, so that no one of them can act separately.

And therefore to answer the end of the motion, this method must be taken.

The defendant ordered to pay in 1000*l.* he has collected of the testator's money, into the bank, in the name of the Accountant General; and his Lordship appointed a receiver of the whole estate, to pay in, from time to time, what he receives whilst the will is contesting in the ecclesiastical court.

I will direct Mr. Clark who has received 1000*l.* of the testator's money, to pay it into the bank, not to the account of the trustees, but in the name of the Accountant general; and that there shall be a receiver appointed of the whole estate, who shall pay in what he receives from time to time into the bank, with the Accountant general's privity; whilst the validity of the will is contesting in the ecclesiastical court (1).

(1) See *Hatbornthwaite v. Russell*, ante 126. *Phipps v. Steward*, ante 1 vol. 285.

Case 253. *Clerk and others versus Miller*, at the Rolls, July 28, 1742.

A feme covert, who had a separate estate, employs workmen in her husband's

house, without his directions, and promises to pay them; the Master of the Rolls doubted, whether a parol promise can subject lands, but she submitting to pay, he decreed accordingly.

A Feme covert, having a separate estate, sets workmen to work in her husband's house, without his directions, and promises to pay them; there are other creditors on the same foot,

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The bill was brought by creditors against the representatives of the husband, and the widow to have the separate estate of *Mary Miller*, and also the assets of the husband, applied towards satisfaction of their debts.

Master of the Rolls: I doubt, whether upon the bare promise only, that is but parol, her lands can be subjected, which is what is prayed by the bill; but she submitting, by her answer, to pay, thought this a good reason for decreeing accordingly (1).

(1) His Honour directed an account of the personal estate of *John Miller*, and of his debts and legacies, and an enquiry of what debts the defendant *Mary Miller* contracted for and agreed to pay out of her separate estate; the consider-

ation of further directions reserved till the Master had made his report. *Reg. Lib. A.* 1741. fol. 753. *Vide Masters v. Fuller*, 4 Bro. Cba. Rep. 19. *Lilia v. Airey*, Ves. junc. 277. *Vide etiam Stamford v. Marshall*, ante 68.

Cartwright versus Pultney, July 29, 1742.

Case 254.

D CHANCELLOR,

HERE a bill is brought in this court to have a partition between two jointenants, or tenants in common. The plaintiff must shew a title in himself to a moiety, and not generally that he is in possession of a moiety, and this is more than a partition at law, where seisin is sufficient; the bill of 8 & 9 W. 3. c. 31. was made for that reason.

On a bill for a partition between two jointenants, the plaintiff must shew a title in himself, and not alledge generally, that he is in possession of a moiety (1).

the reason is, because conveyances are directed, and a partition only, which makes it discretionary in this court,

Jope v. Morshes
6 Bear. 213.

if the plaintiff has a legal title, they will grant a partition or a decree where there are suspicious circumstances in the plaintiff's title, the court will leave him to law?

Wick v. Thomas
4 G. Hallyer 5.

his being founded on an equitable title, I must determine therewith it would be without remedy.

Langley v. Fox
9 Bear. 90

the plaintiff need not in his bill set forth a particular title, but only shew a title in fee.

there was a decree at the Rolls for the Master to look into the

Master's report states the title, suspicious circumstances were appeared in the plaintiff's deeds; which, though not proved by him, yet if forged, invalidate the plaintiff's title: and the court made to look into the deeds, upon which the plaintiff set up that title, and set up another, and prayed leave to bring a supplemental bill on that new title, and there are evidences of a

insisted on the plaintiff's part, there ought to be a trial

the defendant is not concerned to litigate this title as to any part of his own, only so far as to see that he has not a precarious title and a bad conveyance, and that in a case where it is necessary in the court to grant partition or not, and would be a great expense to the defendant to a great expense.

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evidence here is all on one side against the deeds: but, on the contrary, the title is deserted, and therefore it is not insisted on the court, where deeds are so impeached, to grant a partition between parties concerned.

there have been cases where the court has condemned deeds to a trial, for instance, *John Ward's* case, who was directed to be prosecuted by the Attorney General, and this by the House of Lords.

the title on the original bill must be laid out of the case, and the bill must be with costs.

the title on the supplemental bill, the objection to it is, that it shews an equitable title, not a legal one.

(1) *Vide Parker v. Gerard, Amb. 236.*

CARTWRIGHT
V. PULTNEY.

The court will
decree against a
fine levied under a forged deed.

Where a fine and non-claim is levied by one who got pos-
under a forged deed, a court of equity would decree again
fine (1).

But I must in this decree direct the plaintiff to pro-
conveyance by his trustees, and the Master to consider w
such.

Further objections have been made to the title: circum-
of fraud in the conveyances, want of consideration, &c.

These objections are not such as concern the defence
respect to the partition, for if the owners were in equi-
tled to have a reconveyance on the fraud, yet the defenda-
being privy, and the person being in possession who had th
title, and being party to the partition, the relief would not
to that, if equally made, but the court would decree sub-
the partition; if, indeed, it was defective in law, that
be an objection, but as they must come into equity, the
do equity to the defendant.

The last consideration is, what I am to do? I am of
that I may decree a partition on the supplemental bill, &
parties on both sides are to procure the trustees to convey;
the Master will consider of that on framing the convey-
and, if any doubt shall arise, may come before the court
ceptions.

The plaintiff must pay the whole costs of the first suit
original bill; and I must reverse the decree on the original
with costs; and on the supplemental bill make a new dec-
partition, and reserve the costs (2).

(1) *Clarke v. Ward, Prec. Cha.* 150.
1 *Eq. Abr.* 258. 1 *Ves.* 289. *post.* 388,
390.

(2) *Reg. Lib. A.* 1741. fol. 70

Cafe 255.

Connor versus The Earl of Bellamont, July 31, 1742

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Where the debt
was contracted
in England, but
the bond taken
for it in Ireland,
to be paid at a
certain time, and at 7 per cent. it shall carry Irish interest (1).

THE question was, Whether *English* or *Irish* interest
to be allowed? In the present case the debt was con-
ed in *England*, but a bond taken for it in *Ireland*, to be
a certain time, and at 7 per cent.

(1) *Prec. Cha.* 128. 1 *P. W.* 396.
1 *Eq. Abr.* 282, 289. *Saunders v. Drake*,
post. 465. But tunc if the bond contract
or mortgage was executed in *England*.
(*Hipps v. Earl of Anglesea*, 1 *P. W.* 636.
Stapleton v. Conway, *post.* 3 vol. 727. 1
Ves. 427); in which case such contracts
or securities could only carry interest at
five pounds per cent. until the statute 14

Geo. 3. c. 79. which enacts, that a
gages and securities executed in *Gr*
tain upon property in *Ireland* or the
bearing interest not exceeding *five*
per cent. shall be valid and effectua-
less the money lent shall be lent
the time to exceed the value of t
erty pledged. However the r
holds, where the interest is above

LORD CHANCELLOR,

It is insisted the bond ought to carry *English* interest, and if it had been a simple contract debt only, I should have been of opinion it ought, and the variation of place would have made no difference.

But where the security is given upon an estate in *Ireland*, it must be considered as referable to the place where it is made, or who would lend money upon *Irish* security?

As to the cases of *Lord Ranelagh* versus *Sir John Champante*, 2 *Vern.* 395. and *Prec. in Chan.* 128. cited by Mr. *Brown*; they are quite different from this, because the bond for securing the debt was executed here in *England*.

There might be many cases cited; as for instance, the transactions among merchants with regard to the *respondentia* bonds, which carry 10 *per cent.* though entered into upon an agreement made in *England*; yet, as they relate to matters arising in the *East Indies*, they will not be deemed usurious, but shall be binding upon the obligor.

If I was to lay down a rule that where the contract is made in *England*, notwithstanding the security is taken in *Ireland*, and he estate lies there, it shall be governed according to the rate of interest upon money in *England*, it would be attended with ill consequences.

But here is a much stronger circumstance in this case, for there was actually a fall of timber upon an estate in *Ireland*, and thousand pound raised of *Irish* money to pay off the debt.

Therefore let the exception to the Master's allowing *Irish* interest, upon the bond, be over-ruled.

ent. And it seems, that the act only respects such bonds as are entered into as *Material* securities for money lent on *engagements*, but not mere *personal* contracts.

Vide Dewar v. Span, 3 *Term. Rep.* 425.
Scott v. Nesbitt, 2 *Bro. Cha. Rep.* 641.
With respect to legacies, see *Saunders v. Drake*, *post.* 465.

Staunton versus *Oldham*, July 31, 1742.

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LORD CHANCELLOR,

THIS comes before me upon exceptions to a Master's report, to whom the cause was referred, upon a decree to *account*.

The court, where there is such decree, never suffer it to be signed and inrolled, because it ties up their hands, if there should have been any defect in the directions of the decree, from relieving in that particular, and defects are very frequent in uses of this nature, and therefore the decrees are left open, in order to give parties an opportunity to re-hear, where directions in a decree are imperfect.

CONNOR V.
Earl of
BELLAMONT

Paul
Booke
4. C. 8. 12
Young
13. Simon
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Case 256.
Parker v. Dow
1 M. & Keen. 6

The court never suffer a decree to account to be signed and inrolled, because it ties up their hands from relieving, if there should have been any defect in the directions of the decree.

Report of His Case sermons
See Chinn & Cooke. 1. Sed. Hops.

Cafe 257.

Parteriche versus Powlet, August 2, 1742.

LORD CHANCELLOR,

S. C. ante 1 vol.
467.

S. C. ante 54.

A charge by
answer, must
be discharged by proof.

WHERE a plaintiff is charged by an answer, he discharge himself by proof, and cannot do it by the whole answer, as he may at law.

A tenant for
life, though
without im-
peachment of
waste, shall be
obliged to keep tenants' houses in repair.

An exception is taken to the Master's report, that he charged the tenant for life without impeachment of waste, several sums for the repairs of tenants' houses upon the estate.

not correct -

c. Lunsdowne's
in B. & C.

Lord Hardwicke over-ruled the exception, and said, not standing tenant for life is without impeachment of waste shall be obliged to keep tenants' houses in repair, unless charge is excessive, and shall not suffer them to run to ruin.

Not only contrary to the statute of Frauds, but to the common law before the statute, to add any thing to an agreement in writing by parol evidence (1).

A question arose upon the special matter of the Master's report, whether parol evidence should be admitted to explain the written agreement.

LORD CHANCELLOR,

ell. v. Robinson
B. & C. 928.

dec. of Lord

c. Lunsdowne

Samson

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Where a marriage agreement is complete, and reduced to deeds and writings, to superadd any thing afterwards is a very favourable case.

By the settlement the portion of the wife appears to be 5000*l.* and at the same time she gave a bond to the husband's father the penalty of 1400*l.* for securing 700*l.* and signed by her at the bottom the husband in his own hand has written, *this to be my debt.*

Parol evidence has been read to explain this affair; but of opinion that evidence must be laid out of the case, at advantage ought to be taken of it by either side.

As I am obliged to confine myself to the deeds, it appears to be an extortion in the father of the husband, after the thing was agreed.

The wife signs the bond, and the husband at the bottom writes, *I own this to be my debt*; what is the natural construction why that the wife became surety for her intended husband to pay the father this sum, most probably for a debt the son owed the father.

To add any thing to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the statute of frauds and perjuries, but to the rule of construction.

(1) See *Lake v. Philips*, 1 Ch. Rep. 219. *Have v. Sherwood*, 110. *Iraiam v. Child*, 1 Bro. Ch. Rep. 168. *Jordan v. Sax* 92. *Lord Portmore v. Morris*, 2 Bro. 3 Bro. Ch. Rep. 388.

that statute was in being; and therefore I shall the wife's real estate shall not be charged with the this bond (1).

PARTRICHE
V. POWLET.

too in this case had a separate estate by virtue of the settlement; the husband had an incumbrance upon his wife advanced money to pay it off, and the receipt mortgagee was delivered to her; the question is, whether is a bounty, or a loan only from the wife, for the receipt produced; if it is by way of loan, she having a separate estate must be considered as a distinct person, and is entitled to stand in the place of the mortgagee as a creditor, and it is like this case; suppose a husband has a mortgage on his estate, and a wife joins with him in charging her estate, though her estate is liable to the mortgage, in this court her estate shall be looked upon only as a separate estate, and she is intitled to stand in the place of the mortgagee, and be satisfied out of her husband's estate.

A husband has a mortgage upon his estate, the wife joins with him in charging her own, if she survives, her estate shall be looked on only as a pledge, and she is intitled to be satisfied out of his estate, as standing in the mortgagee's place.

referred back to the Master to review his report, and into the nature of the receipt, and to examine the answer to the wife's draft for this sum of money.

ed, that in the said bond for *l. Sarah Ward* ought to be as a surety for plaintiff, her estate in case any part of the mortgage shall become a charge on personal estate, the same exonerated by the plaintiff.

Reg. Lib. B. 1741. fol. 432. So Tate v. Austin, 1 P. W. 264. Lucan v. Mertins, 1 Ves. 313. and Clinton v. Hooper, 3 Bro. Cha. Rep. 201. in which case this point was fully discussed. Vide Galton v. Hancock, post. 424. 439.

versus *Haskins Stiles Eyles*, August 3, 1742 (1).

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Case 258.

Smith was concerned with the late *Mr. Haskins Stiles* in a mortgage duty, under a lease from the Dutchess of the lessees entered into articles mutually to indemnify: *Sir John Smith* has paid 2000*l.* which was the fifth part of *Haskins Stiles* ought to have paid as his share, for which his bill against *Mr. Haskins Stiles* in his life-time; and by the decree of the court there was a decree, that it should be paid to the Master to see what was due to *Sir John Smith*; very soon after *Mr. Haskins Stiles* died, and by his will appointed *Haskins Stiles Eyles* his executor, who, before the report of the 2000*l.* due to *Sir John Smith*, confessed to his father *Sir John Eyles* for 6000*l.* the exception, to the Master's reporting this judgment to be of a fifth part to the plaintiff's demand of 2000*l.* under the decree.

A decree quod computet, makes no variation as to an executor, for before a final decree, he may confess a judgment, and it does not at all alter the nature of the demand.

The Master General for the exception, insists, that though he does not ascertain the quantum of the debt, yet it goes to alter the nature of it, and to give it the sanction of a judgment.

Sub. of Beaufort
Philipp
1/2 Dr. Geo. Eyles
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Beaufort v. Haskins
6 Nov. P.C.
56.

(1) *Reg. Lib. B. 1741. fol. 431.*

SMITH v.
HASKINS.

Mr. *Murray* on the same side said, the point is here determined in the decree, for the demand is liquidated, and the direction is to take the account only for the benefit of Mr. *Haskins Stiles*, who is at liberty to discharge, but it now comes out that he was not able to set off a single farthing; so that as there is no variation, but remains as it did when the decree was made a liquidated sum, it must have relation to the time of the decree, and therefore differs greatly from a common *decree quod computet*.

It is the administration of Mr. *Haskins Stiles* who has confessed this judgment to his own father; and it would be very hard if he may thus postpone a creditor for a certain sum, to a judgment given to so near a relation.

There is another circumstance for Sir *John Smith*, that Sir *John Eyke*, the judgment creditor, had notice of the demand, and likewise of the decree, and therefore lent his money with his eyes open, and ought not to be preferred as he was no stranger to this transaction.

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Mr. *Ord*, counsel on the other side, said, that here is nothing in this decree, but common directions for the Master to see what is due from one party to the other; and it may come out that there is a balance due from the plaintiff to the defendant, and cannot be called a final decree till the Master's report is confirmed: he insisted likewise that it is an account to be taken generally between the plaintiff and defendant, and not, as Mr. *Murray* said, for the defendant only to account. In answer to the point of notice, he cited the case in *Salk.* 507. *Mason* versus *Williams**.

LORD CHANCELLOR,

I thought this question had been determined and settled; but ingenious men I find can take distinctions, where the thing itself will not admit of it.

The difference between a decree *quod computet*, and a final decree, was taken and settled in the case of *Morris* versus *the Bank of England*, *Cas. in the time of Lord Ch. Talbot*, 217.

Decrees of this court are here put upon the same footing with judgments at law (1), though they have not obtained the same privilege *there*.

It is allowed that if a decree is obtained against a testator, or his executor, *quod computet*, it can by no means be put upon an equality with a judgment confessed after such decree.

A decree *quod computet* always concludes in the same manner and yet does not vary at all as to the executor, for before a final decree the executor may confess a judgment, and does not at all alter the nature of the demand, notwithstanding the words as

* It was held by Lord Chancellor *Cowper*, that an executor may pay debts of higher nature after a decree *quod computet*, but not after a final one, for such a decree is in the nature of a judgment, *Mason* versus *Williams*.

(1) *Bligh* v. *Darnley*, 2 P. W. 621. *Frej, Prec. Cha.* 179. *Martin* v. *Martin* *Searle* v. *Lane*, 2 Vern. 89. *Mason* v. *Williams*, 2 Salk. 507. *Björp* v. *God-*

serted in the decree, *that each party do pay*; for these words are by a direction to the Master, to insert what shall appear to be due upon the balance to either party; and when the order is made solute, the money is to be paid to the person reported to be indebted.

SMITH v.
HASKINS.

These decrees have been truly compared to *interlocutory* judgments at law.

Suppose a man dies indebted by bond, and is likewise indebted on covenant, and an action is brought upon the covenant, and interlocutory judgment is *quod recuperet*, &c. and before the issue of inquiry of damages is executed, and final judgment entered up, the testator dies, and the executor confesses a judgment to the bond-creditor, he may plead it in bar to a *scire facias* on the action of covenant.

An action of covenant brought, and an interlocutory judgment *quod recuperet*, before final judgment, the testator dies, the executor confesses a judgment to a

bond-creditor, he may plead it in bar to a *scire facias* on the action of covenant.

So here in equity upon a decree *quod computet*, it does not pass [387] *rem judicatam*, till the final decree.

A decree *quod computet* does

not pass *in rem judicatam*, till the final decree.

But here it is said that there is a liquidated sum, and nothing remains on the part of Mr. *Haskins Stiles* by way of discharge on the Master's report.

But it will be very dangerous to admit of such nice distinctions, the points with regard to assets are numerous enough already, I will not suffer them to be made upon the particular wording of his decree.

But even the fact here does not warrant the distinction; it was in the House of Lords, in the case of *Morris versus the Bank of England*, that in a decree *quod computet*, it is impossible to pronounce who will be the debtor or creditor, and no stress is to be laid upon the words *that each party do pay* in the decree.

No stress to be laid on the words that each party do pay in a decree *quod computet*, for till the account taken, impossible to

pronounce which will be the debtor or creditor.

The exception was over-ruled, and the judgment creditor was ordered to be satisfied out of the assets of Mr. *Haskins Stiles*, payable to the plaintiff Sir *John Smith* (1).

(1) So *Mason v. Williams*, 2 Salk. 507. *Thom v. Earl of Oxford*, Prec. Cha. 3. *Goodfellow v. Burchett*, 2 Vern. 3. *Contra Joseph v. Mott*, Prec. Cha. 79. It now seems settled, that where a decree is obtained at the suit of creditors on account of the testator's personal debt, it will bind other creditors, and

if they sue at law, the Court will award an injunction. *Martin v. Martin*, 1 Ves. 211. *Douglas v. Clayton*, cited 1 Bro. Cha. Rep. 184. *Goate v. Fryer*, 3 Bro. Cha. Rep. 23. *Hardcastle v. Chestler*, 4 Bro. Cha. Rep. 163. *Vide etiam Lowthian v. Haffell*, 4 Bro. Cha. Rep. 167.

Case 259. *Baker versus Pritchard, alias Hosier, August 4, 1742 (1).*

The defendant demurred to the discovery sought with relation to the perjury in a suit at law charged to be committed by her procurement; and likewise to the discovery sought touching the proceedings before the delegates: she has also pleaded the common plea of fine and non-claim in bar to the title set up by the plaintiff.

Lord Hardwicke hold, that the sentence in the Delegates cannot be read, as this is a demand for real estate, and they proceed there by different laws, and in matters too relative to the personal estate only and allowed the demurrer as to this part.

Nichols. Quest.

Russell M. 440

Ans. in Murray

3 Nov. 17. 105

The causes of demurrer are two: 1st, That what is prayed with regard to the perjury, would subject her to punishment; 2dly, That the proceedings in the court of delegates relate only to personal estate, and therefore she is not obliged to set it forth, as this is a demand for real estate.

Mr. Noel, upon the point of the fine and non-claim, cited for the plaintiff *Allen versus Sayer*, 2 Vern. 368.

Mr. Murray on the same side, laid it down, that the distinction here with regard to reading sentences in the ecclesiastical court is this, that if the precise point is determined there, it may be read here; but if it was only a collateral thing, and not the direct point in the cause, which came before the ecclesiastical court, it cannot be read here.

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He allowed the defendant was not obliged to set forth, that she suborned the witnesses at the trial at law, but she may answer whether the verdict was not principally obtained upon the evidence of this person, who was perjured.

That the demurrer therefore covers too much, and if defective in part, it is bad for the whole, for a demurrer cannot split.

As to the fine and non-claim, he insisted there was no non-claim in the present case; for the fine was in 1733, the bill filed soon after, and the plea and answer did not come in till 1741, so that here was a proceeding all the time.

Another ground, he said, for not allowing this fine was, that it is fraudulent, because the defendant has changed the possession by collusion with the tenants of the estate, who entered into an agreement to deliver the possession, provided they may pay the rents into a third person's hands, until the event of the suit was over.

Mr. Brown insisted for the defendant, that nothing was done from the year 1735, till 1741, so that here is a quiet possession of six years at least.

LORD CHANCELLOR,

Though a fine has been levied, yet if it is under circumstance of fraud, the court ought to prevent the stealing away an estate in this manner (2).

First, *as to the demurrer.*

BAKER V.
PRITCHARD,

I think it proper, because it is plain all the matters referred to the bill are relative to proceedings in the ecclesiastical court.

As the demand in this court is for real estate, I think it would be of dangerous consequence to admit the sentence of the court of legates to be read here, who proceed by different laws, and in matters relative only to the personal estate (1).

If indeed, in the life-time of Admiral *Hesler*, there had been a proper suit instituted in the ecclesiastical court relating to * the marriage, and sentence had been given against it, that would have bound * every body, because it is final and conclusive, as being a proper jurisdiction, and so in cases of the like nature.

A suit in the ecclesiastical court, in Admiral *Hesler's* life-time, and a sentence against it, would have bound every

body, being conclusive, as it is the proper jurisdiction in cases of this nature.

But here it was a mere collateral point, which came before [*389] the ecclesiastical court, for it was a question relating to the administration, and the marriage was incidental only.

It is to be wished indeed, that the proceedings in all cases were uniform, but as the ecclesiastical court is the law of the land, it does sometimes happen that they determine contrary on the same facts, as in the case of *Montague* and *Maxwell*†.

That the proceedings in all courts were uniform, is much to be wished, but at present the ecclesiastical court frequently determines contrary upon the same facts.

ecclesiastical court frequently determines contrary upon

The demurrer as to this part, therefore, must be allowed.

As to the other part, I do admit the defendant might demur, to so much of the bill as alleges, whether she procured the subornation of perjury; but then the question will be, whether the defendant might not have divided it, and answered as to the evidence of *Phillips's* influencing the verdict, and which was proved by her.

As a demurrer cannot be good for part, and bad for part, Lord *Hardwicke* allowed it likewise as to the discovery sought in

relation to the subornation of perjury.

It is truly observed that a demurrer cannot be good for part, and bad for part (2), and I think the question as to the influence of *Phillips's* evidence is a part of the other question, and that it not distinct, but mutually relating one to the other, and therefore the demurrer is proper.

(1) It seems a discovery must lead to nothing material to a suit at law or in equity. *Debigge v. Howe*, cited 3 Bro. Rep. 155. *Finch v. Finch*, 2 Ves. 2. *Vide Dyneley v. Dyneley*, post. 394.

(2) See *Earl of Suffolk v. Green*, ante 1 vol. 451.

† This must be understood in civil cases, for as to criminal, it has since been determined in the House of Lords, that such sentence is no bar to a prosecution for bigamy. See St. Tr. vol. XI. Dutcheffs of *King's son's* Trial.

† A person who proved a will in the spiritual court, by which he swore the testator of sound memory, afterwards controverted the same will at law, as to the real estate; in which an issue was directed *compos* or *non compos*, and found *non compos*, April 1, 17, before Lord *Cowper*. *Vide Vin. Abr.* title *Executors*, p. 65. sect. 9.

BAKER v. PRITCHARD. I am as fully of opinion the plea ought to be over-ruled.

The defendant pleaded likewise a fine and non-claim, in bar to the title set up by the plaintiff; Lord *Hardwicke* over-ruled it, because the pendency of the suit here, as it was a proper matter of equity, has prevented the running of the fine (1).

As to the objection of referring to the former proceedings, though it may seem odd, it is not at all necessary to relate how the fine was levied, only that the person was seised, and that he levied a fine (2).

An objection has been made, that this is not a trust-estate from Admiral *Hofier*, but a legal one from him to *Baker*, his heir at law, who devised it in trust for the benefit of his children.

[390] Now I will not lay it down generally, that in the case of a trust-estate, a fine and non-claim shall not prevail; for, suppose a fine is levied by a person in possession, not affected by the trust, there can be no doubt but the remainders would be barred by the fine, and it would be of dangerous consequence to property if it was otherwise.

The plaintiff was an infant at the time of the fine levied; I will lay the trust out of the case, and suppose it a legal estate, the infant might have a bill against the person in possession for an account of the rents and profits, for the person in possession is looked upon only as a guardian for the infant (3).

The bill preferred by the infant, when he came of age, is not at all more improper, than an entry at law or real action brought, to avoid the fine.

For otherwise it would trip up the jurisdiction of this court, if you will not allow, where it is a proper matter of equity, a bill to prevent the running of a fine.

But if this was not quite so strong, the other objections are; and if I was to suffer the fine to be a bar, it is allowing the defendant to steal away the estate.

No exception can be taken to an answer whilst a plea is depending, for that must first be removed out of the way. It was necessary to support this plea, to have set forth a full and sufficient answer, for while a plea is depending, no exceptions can be taken to an answer, but the plea must first be removed out of the way, and that was the very reason the plaintiff lay by till the plea was determined, and accounts for the running of so much time.

Where tenants give a conditional possession only, provided they may pay their rents to a third person, till a suit is determined, a fine levied under such a possession, will not be suffered to stand. It is very probable that the application to the tenants was merely with a view to the scheme of the fine, but the possession given by them to the defendant was not absolute, but under terms amounting to a trust, for it was conditional, provided they might pay their rents into a third person's hands, till the suit was determined.

(1) *Pincke v. Tbonnycroft*, 1 Bro. Cba. Rep. 289.

(2) *Story v. Lord Windsor*, post. 630.

(3) *Newburgh v. Bickerstaffe*, 1 Vern. 295. *Faulkland v. Bertie*, 2 Vern. 342. *Allen v. Sayer*, 2 Vern. 368.

If a court of equity suffer a fine, levied by a person who has a possession, to stand? I am sure, if I should, a fine, is said to be a solemn act, and an end to all controversies, cease to be so, and would be introductory of numerous ; even at law, fines will be set aside for fraud, as in the case of a tenant for years (1), and this is a much stronger case, therefore the plea must be over-ruled.

BAKER v. PRITCHARD.

Should such a fine prevail, what is said to be a solemn act, and an end to all controversies, would cease to be so, and introductory of numerous frauds.

Even at law, fines will be set aside for fraud, as in the case of a tenant for years.

Fermor's case, 3 Co. 77. a. 2 Vesf. 481. *Whaley v. Taucred*, 1 Vent. 241. *ereeton v. Gamul*, ante 240.

Whitchurch versus Hide, August 4, 1742 (1).

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Case 260.

HIS was a bill brought founded on the right of the mayor, commonalty, &c. of the city of London, for supplying the parish of Southwark, and the adjacent places, with water ; by virtue of several mean assignments. the plaintiff is now in possession of this right, exclusive of all others ; and prays an injunction against the defendant, to restrain him from encroaching on this right, by raising engines, laying pipes, and breaking up the ground, &c. and to have it established in this court against the defendant and all others.

The plaintiff, through several mean assignments, being in possession of a right originally in the city of London of supplying Southwark with water, prays an injunction to restrain the defendant

encroaching on this right, by raising engines, laying pipes, &c. and to have it established in this the defendant demurred to the bill, for that the plaintiff ought first to have established his right at law, was a strong reason for it (2).

The defendant demurs, and for cause of demurrer shews that the plaintiff ought first to have established his right at law.

THE LORD CHANCELLOR,

in this bill is brought upon an exceeding unfavourable case, for that some measure setting up a monopoly ; and such a kind of right as is claimed in no other part of this town, neither by the brick-buildings company, or the New-river-head, or even by the city of London itself, in any part of it ; nor can any person be allowed to break up streets without an act of parliament. The supplying the borough of Southwark with water is of consequence to the publick.

Now, it is said, a man may bring a bill, if he has a legal right to establish his right, without first trying it at law, as in all cases of fisheries in rivers, &c. where there is no general prohibition.

The counsel for the plaintiff have cited cases of this kind, and might have been many more mentioned ; as for instance, cases of new inventions upon the act, that fixes the sole right of books in the authors, for it is under a common gene-

¹ *Reg. Lib. B.* 1741. fol. 321.

(2) See *Lord Teynham v. Herbert*, post. 483. and notes

WHITCHURCH
v. HIDE.

ral right upon the statute, so likewise under the act of parliament for vesting the sole property in prints of new invention (1).

But I apprehend, when these acts were first passed, the court did not immediately grant an injunction, to restrain all other persons till the letters patent had been first established at law (2).

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But, in the present case, it would run to a prodigious expence to enter into a long examination, arising upon consequential and collateral matter, when probably even the very foundation for the plaintiff's right may fail, which would make the expensive proceedings here entirely fruitless, when one trial at law may possibly quiet the question.

Where a person has a sole exclusive right, which is infringed upon, if an action of trespass will not lie, he may have an action of the case, for the law will not permit a man who has a right, to be without a remedy.

As to the objection that the plaintiff may have no remedy at law, there is but little weight in it; for if he has a sole exclusive right, no doubt but he has a remedy; and if any person infringe that right, and he cannot bring a common action of trespass, he may have an action of the case, for the law will not permit a man who has a right to be without a remedy.

As this is a case of great consequence to the publick, I would allow the demurrer, even if there were no other reason; but the risque the parties may run, in going into a very large expence, and long examination here, to no purpose, and the chance there is of the plaintiff's right falling to the ground at law, is a very strong reason for it.

The cases cited for the plaintiff were *Buss versus Western*, *Prec. in Chan.* 530. *The Duke of Dorset versus Serjeant Girdler*, *id.* 531, and *the Mayor of York versus Sir Lionel Pilkington*, *May* 5, 1707. See 1 *T. Atkins* 282.

For the defendant, in support of the demurrer, were cited, the cases of *Powlet versus Ingres*, 1 *Vern.* 308. *Reynolds versus Hind*, *May* 5, 1729, in the *Exchequer*.

(1) See *Anon.* 1 *Ves.* 476. *Bell v. Hill v. University of Oxford*, 1 *Vern.* 275. *Walker*, 1 *Bro. Cha. Rep.* 451. *Carnan Anon.* 2 *Ves.* 414. *Blanchard v. Hill*, *v. Bowles*, 2 *Bro. Cha. Rep.* 80. *post.* 485.

(2) See *Anon.* 1 *Vern.* 120. *East India Company v. Samys*, 1 *Vern.* 127.

Case 261.

Chauncy versus Tubourden, August 4, 1742.

An executor brings a bill for the discovery of the defendant's marriage, who demurs, for that if she was to discover what is asked, it would be a forfeiture of her legacy of 1500*l.* as it is given conditionally, if she marries with the consent of the trustees under the will. *Lord Hardwicke* allowed the demurrer, as she cannot answer to the marriage without showing at the same time it was against consent.

THE bill was brought by the plaintiff, executor of a will, for a discovery of the defendant's marriage.

for that if she was to discover what is asked, it would be a forfeiture of her legacy of 1500*l.* as it is given conditionally, if she marries with the consent of the trustees under the will. *Lord Hardwicke* allowed the demurrer, as she cannot answer to the marriage without showing at the same time it was against consent.

The defendant demurs, because if she was to discover what is required of her, it would be a forfeiture of her legacy, which is no less than 1500*l.* for it is given her conditionally, provided she marries with the consent of the trustees under the will.

The counsel for the plaintiff insisted, that the defendant ought to discover, and compared it to a case before Lord Chancellor Talbot, where a husband gave an estate to his wife by his will, whilst she continued a widow, with a limitation over to the plaintiff in the cause, in case of her second marriage.

CHAUNCEY v. TANHOURDEN.

A husband by will gave an estate to his wife, whilst she continued a widow,

with a limitation over to another, in case of her second marriage; the remainder-man brought a bill for discovery of the second marriage, and she demurred, as subjecting her to a forfeiture. Lord Talbot over-ruled the demurrer, as it was not a condition, but a limitation over of an estate, and therefore could not properly be called a forfeiture.

The remainder-man brought a bill against the widow, for a discovery of her second marriage; she demurred, as it subjected her to a forfeiture; but he over-ruled the demurrer.

LORD CHANCELLOR,

In the first place, this is a harsh demand in a court of equity, or it must be admitted, that if a person incurs a forfeiture by discovering, he may demur.

On a bill to set aside an usurious contract, a defendant may demur to the discovery of what interest he agreed to take, for that he cannot set this forth, without disclosing the very interest he has taken.

every of what interest he agreed to take, for that he cannot set this forth, without disclosing the very interest he has taken.

I have known a bill brought here, and in the court of Exchequer, for discovery of waste, and the demurrer allowed in both courts, because the plaintiff had not waived the penalty.

In the case mentioned by Mr. Clark of an usurious contract, it was a bill only to perpetuate testimony, and did not seek to discover from the defendant upon oath, whether the contract was usurious.

The legacy is given here at the age of 21, or day of marriage, with the consent of such and such persons, but if she marries without the consent of those persons, it is given over.

Therefore this would tend to make her forfeit the legacy, if she is to set forth whether she was married before 21.

But in the case before Lord Talbot it was a limitation over of an estate, and not a condition, and therefore could not properly be called a forfeiture (1).

I would put this case, suppose a man should bring a bill to set aside an usurious contract; and, in the interrogatory part, should ask the defendant what interest he agreed to take; how can he set forth what interest he agreed to take, without discovering at the same time the very interest he has taken (2)?

So, here when the bill asks her to discover whether she is not married, how can she answer that, without shewing at the same time it was a marriage against the consent of the trustees, and by that means subject herself to a forfeiture; therefore the demurrer must be allowed (3).

(1) So *Lucas v. Evans*, post. 3 vol. 260. *Chauncey v. Fenboulet*, 2 Ves. 265. *Contra Monnins v. Monnins*, 2 Cha. Rep. 68.

(2) *Anon* 2 Eq. Ab. 70. pl. 7. *Earl of Suffolk v. Green*, ante 1 vol. 450. *Har- rington v. Southgate*, ante 1 vol. 539.

(3) *Wrottesley v. Bendish*, 3 P. W. 239. *Chauncey v. Fenboulet*, 2 Ves. 265. See *Fane v. Atke*, 1 Eq. Ab. 77. pl. 15. *Lord Uxbridge v. Staveland*, 1 Ves. 56.

Case 262.

Dineley versus Dineley, August 4, 1742.

A demurrer will lie to a bill brought to discover whether there is such a person, or where

THE bill was brought to establish the will of Sir *John Dineley*, and seeks a discovery of the defendant, whether he has any son now living by the late Sir *John Dineley*. in order only to make him a party.

The defendant demurred (1), for that she was a competent person for him to examine at law.

LORD CHANCELLOR,

You cannot bring a bill here to discover, whether there is a person, or where he is, in order only to make him a party suit in this court, and therefore the demurrer must be allowed.

(1) " For that the defendant, for any thing that appears to the contrary by the bill, was a competent witness, and ought to be examined as such, touching the several matters, of which the discovery is sought by the Demurrer allowed. *Reg. Lib. A.* fol. 540. See *Wych v. Mead*, 3. 311. note (I.) *Plummer v. May*, 426.

Case 263.

Lisset versus Reave, August 4, 1742.

A bill brought by a principal, to discover what goods the defendant bought of his agent; he demurred, for that he is not obliged to set out what gain he has made by the retail; the demurrer over-ruled.

A Bill was brought by some *Leghorn* merchants against a defendant to discover what quantity of straw he bought of *Sedgewick* and *Bernard*, the plaintiff's agents, and how much money remains unpaid, that it may be paid to them; they fear their agents should be insolvent.

The defendant demurred to the discovery, for that he was not to be obliged to set out what gain he has made by the retail of them.

LORD CHANCELLOR,

Where a principal transmits goods to an agent or factor, he is sure he may maintain an action against the person who is that factor, for what remains due to his factor (1).

In the case of transferring stocks, it is very often done by brokers without the principal's being so much as mentioned; yet he may maintain an action against the person to whom the stock was transferred.

Lord Hardwicke therefore held the demurrer in this case insufficient, and ordered it to be over-ruled.

(1) *Contra* where goods are sold at the factor's own risque. *Scrimshire v. A. 2 Sira. 1182. Vide 1 Term Rep. 115.*

Lacon versus Lacon, August 6, 1742.

Cafe 264.

THE plaintiff's testator, as was insisted by the bill, was employed by Sir *Edward Leighton* in his life-time as his attorney, and by Lady *Leighton* his executrix since, and seeks a recovery, whether there are not now in her hands bills of fees delivered by the plaintiff's father as an attorney, both to Sir *bn Leighton* and herself, and whether one of them did not promise to pay, and whether an original was not filed against her the debt.

The defendant pleaded the statute of limitations, that no action accrued within six years before the filing of this bill, nor has within that time made any promise to pay, neither does she now there is any original filed, but believes it to be a mere fiction (1).

Master of the Rolls, William Fortescue, Esq; The plea must be allowed, because the affidavit of the original's being filed, is set in general terms without mentioning in what court; and on the former hearing *Lord Chancellor* was of the same opinion; I said besides, that supposing an original was filed at law, if there has been no proceeding upon it for six years, it will not prevent the statute from running on the demand.

1) This circumstance of seeking a bill filed, does not appear in the Register's copy whether an original was not filed. *Reg. Lib. B. 1741. fol. 486.*

Though an original be filed at law, yet if there has been no proceeding upon it for six years, it will not prevent the statute of Limitations from running.

*2d point a Gray
1. 40th. 1742
265*

Lingood versus Croucher, August 6, 1742.

*Hamilton v Bankers
Cafe 265. 1762.*

THE plaintiff and Mr. *Eade* had been partners in trade, but upon the dissolution of the partnership, some disputes arising between them, a suit was carried on for some time in equity; but a proposal being made to refer all matters in controversy, it was agreed to, and the submission was made an order of court; one condition in it was, that the parties should be restrained from bringing a bill in equity against the arbitrators: I awarded 9150*l.* to be due to Mr. *Eade* on the balance of accounts; upon which Mr. *Lingood* brought a bill against the arbitrators, *Croucher* being one, charging corruption and perjury, and praying that they may set forth the general accounts between the plaintiff and the defendant *Eade* relating to the partnership.

So much and such part of the bill as seeks a general account, &c. the defendants refused to discover, and pleaded the act in bar.

The bill further prayed a discovery from what account or accounts of the parties they founded their award.

On this part they likewise refused to discover, and pleaded the award itself in bar.

S. C. post. 502.
Where the parties have agreed to make the submission to an award a rule of court, and to be restrained from bringing a bill in equity, the arbitrators, notwithstanding the award may be defective in point of law, may plead it in bar to a bill here.

*The Earl of
Mansfield
Browne
J. B. 1742.
Pordley*

LORD *Justice Watkinson
6th Nov. 44.
18.*

LINGOOD V.
CROUCHER.

LORD CHANCELLOR,

Arbitrators may plead the award in bar to a bill charging partiality, but they must support their plea by shewing themselves impartial,

There are many instances in this court, where arbitrators to a bill charging corruption and partiality, may plead the award in bar to the discovery; but then it is incumbent upon them to support their plea, by shewing themselves incorrupt and impartial, or otherwise the court will give a party a remedy by making arbitrators pay costs.

or the court will give a party a remedy, by making *them* pay costs.

I remember an instance of this sort in a famous case of *John Ward* (1), who being a party in a cause where one *John Warner* was an arbitrator, upon *Ward's* coming into the room he said, I *John Warner* will make you *John Ward* pay costs.

Ward complained to the court of this partial behaviour in the arbitrators; and the court inverted *Warner's* threats, for they made him pay *John Ward* costs.

The great doubt with me is, as this award seems to be executory and not final, whether it is a good award at law; and if it is not good at law, then how can the arbitrators plead it in bar to the discovery prayed by the bill?

Where a submission to an award has been made a rule of court, it is a contempt of that court to dispute the order, unless they can shew partiality, corruption or misbehaviour in the arbitrators.

When the parties have submitted to make the submission to the award a rule of court, it is a contempt of this court to dispute the order, unless they can shew partiality, corruption or misbehaviour in the arbitrators; and this will depend upon the denial of these facts in their answer; and if they do that sufficiently, the plea ought to be allowed; but still, if upon the hearing of the cause the evidence should be strong enough to convince the court that the arbitrators have been guilty of corruption, partiality or misbehaviour, it will effectually open the plea: therefore I am of opinion notwithstanding any defect in the award in point of law, yet upon the parties agreeing to make the submission a rule of court, and one condition in it being to be restrained from bringing a bill in equity against the arbitrators, the plea of the award by them ought to be allowed.

In the case of *Mr. Robins*, the counsel, who was appointed an arbitrator by this court, accepted of it upon a proviso that the parties would enter into a rule not to bring a bill in equity, which was done accordingly; notwithstanding this, the party against whom the award was made brought a bill against the arbitrator, and charged corruption and partiality; upon which *Mr. Robins* moved Lord Chancellor *King* that he might be struck out from being a party to the cause: his Lordship granted the motion, and said it would be a very great hardship upon arbitrators if they should be harrassed with suits, when they undertake such an employment without any gratification; and that allowing they are liable to such a bill, would effectually discourage persons of worth from accepting of being arbitrators; and therefore he struck him out from being a party.

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(1) 2 Vef. 316. S. C. Vide *Kamishire v. Young*, ante 155. and notes.

in the case of the *East-India* company, where they agreed to pay the penalty, but insisted upon it afterwards; the bill was dismissed as against the person who was liable to the penalty. *the East-India Company v. Sandys*, 1 *Vern.* 127.

LINGOOD v.
CROUCHER.

Fitzgerald versus Burk, August 7, 1742.

Case 266.

ORD CHANCELLOR,

I have not known a plea drawn up in this manner; it is a plea of a mortgage for valuable consideration without any notice of the plaintiff's right, and not in the common manner of pleading, for he begins with deducing the whole title from *Aylmore* and his wife through the several deraignments to himself.

Denying notice of the plaintiff's title, at the time of the execution of the deed, or payment of the consideration-money, is not sufficient; you must swear you had no notice at or before the execution (1).

must swear you had no notice at or before the execution (1).

The plaintiff claims as heir at law; the defendant's manner of pleading he had no notice is too restrained, for he does not swear at or before the execution that he had no notice, but cauti-ly at the time of the execution, or at the time he paid the consideration; he swears he had no notice. *The plea was allowed.*

Vide Moore v. Maybow, 1 *Cha. Ca.* *Hardingham v. Nicholls*, *post.* 3 vol. *Story v. Lord Windsor*, *post.* 631. 304.

Burk versus Brown, August 7, 1742.

Case 267.

ORD CHANCELLOR,

HERE are several points here that rarely come before a court of equity, but when they do, I must judge of them as in a court of law.

In the plea of an alien, you must aver the person was an alien, or otherwise it is no bar.

The plaintiff's demands relates to the real estate of the defendant's wife's father, devised by him to the mother.

The account is sought by the bill of this estate.

The plea put in of a conveyance to the defendant by the mother, so a plea of an alien; now, it must depend merely upon the ability from the mother's being an alien, for the defendant made out the other part of the conveyance to himself; if a voluntary settlement had been shewn from the mother notwithstanding her being an alien, I should have thought it to the plaintiff's demand; but nothing is more frequent, for parties to desert the strongest part of the case, and endeavour to cover it with a weaker.

It must depend singly upon the plea of her being an alien and consequently incapable of transmitting any descent of lands to her daughter.

.. II.

B b

A a

BURKE V.
BROWN,

As to the shewing the want of civil blood, I must lay this out of the case, because the defendant has not averred in his plea that she was an alien.

Then it rests singly upon the plea of inquisition on behalf of the crown, by which it is found she was born at *Rotterdam*.

Now, as to that, to be sure it is an unfavourable plea; for it is a very extraordinary thing, that the defendant should have fought out for a disability in his wife, and procured an inquisition from the crown, if it had not been originally with a view of getting a grant of it to himself.

I must take it as strictly as if he had pleaded to an action at law, and will make no presumption in favour of such a plea.

It sets out pretty oddly, for the words are, "by means of the devise, this defendant, in the right of his wife, became seised of all the real estate."

An alien may take by purchase, but then it is for the benefit of the crown.

There is no instance where it has been held, that a person by marrying an alien woman, is seised of the estate purchased by her.

An alien, to be sure, is capable of taking by purchase; but by that is meant a conveyance at common law, or any other kind of purchase, but then it is for the benefit of the crown (1).

I know of no instance where a woman alien is in possession of an estate, but that it must be for the benefit of the crown; and I do not remember it has ever been held, that the husband, by marrying her, can be said to be seised of this estate.

In cases of forfeiture to the crown, an escheator is a known officer, and commissions of this kind should be either directed to him, or to a number of commissioners, of which there must be a *quorum*.

But here the direction is to the advocate general, and the custom of directing to him at *Jamaica* is not set forth; and besides, *Jamaica* is divided into different districts, and it is not shewn here, that the commission was directed to the particular district where the lands lay, and therefore as irregular as if the crown should direct a commission to commissioners in *London*, to try whether lands lying in *Kent* or *Essex* are in the hands of an alien.

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The commission finds, indeed, that she is an alien, but commissions of this kind are distinguished from commissions of attainder, for that is only for the sake of informing the crown; but a commission to inquire whether the person is an alien, is intitle, but no body is bound by it, for a man may traverse it in the proper court of law, and is returnable in the Exchequer, where the party against whom it is found may dispute the justness or validity of it: but as the defendant has not averred, whether the mother was an alien or not, it is still open to be controverted by the daughter, and therefore as to that part of the plea, it is no bar.

The defendant's plea as to the personal estate is a stated account, and a conviction of manslaughter.

(1) *Har. Co. Litt.* 2. a. b. notes 1. 2.

A man who pleads a stated account, must shew it was in writing, and likewise the balance in writing, or at least set forth what the balance was, neither of which is done in this case (1). BURK v. BROWN. A plea of a stated account is bad, unless it shews the account was in writing, and what the balance was.

As to the plea of conviction, there is no colour to say, that his shall stand as a plea; for I cannot take things of this kind to common intent, but must judge with equal strictness, as if it was a plea at common law. In a plea of conviction for capital offence, this court must judge with equal strictness as if it was a plea at common law.

The defendant in his plea, says, that in *October* 1728, in *Galloway*, *A.* gave a mortal wound to *B.* of which he languished and died, but does not say in what part *B.* received the wound; that it was tried at the assizes at *Galloway*, but does not say the persons who tried it had a commission of gaol-delivery, or that they were justices of oyer and terminer. Saying that *A.* gave a mortal wound to *B.* of which he died, without mentioning in what part *B.* received the wound, is bad.

So saying that *A.* was tried at *Galloway* assizes, without saying the persons who tried him had a commission of gaol delivery, is also bad.

Now this is not sufficient, for in a plea you ought to set forth the jurisdiction, and that they had a right to try it, or it will not be strong enough to forfeit personal estate.

As to the plea of not making the Attorney General a party, there can be nothing in it, for the reason I said before, because an inquisition of attainder is only to inform, and does not intitle the crown to any right. An inquisition of attainder is only to inform, and does not intitle the crown to any right.

All the pleas must be over-ruled.

) As to pleas of stated accounts, see *ante* 1 vol. 1. *Dawson v. Dawson*, note 1.

Jones versus Coxeter, August 12, 1742 (1).

Case 268.

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LORD CHANCELLOR,

THE giving of costs in equity is intirely discretionary (2), and is not at all conformable to the rule at law, and in this court they give costs to the time of the decree. Costs in equity are discretionary, and given to the time of the decree; at

law unica directio fiat damnum, and wait till the final judgment.

But at law *unica directio fiat damnum*, and therefore they do not from time to time direct costs, but wait till there is a final judgment.

Here is a suggestion to the court, that the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time. Where the poverty of the plaintiff would not allow her to carry on the cause, Lord

Hardwick ordered the costs to be taxed, and paid to her, to empower her to go on with the suit.

(1) *Req. Lib. A.* 1741. fol. 781.

(2) 1 *Eq. Ab.* 125. note (a) *post*. 552.

JONES V.
COXETER.

Therefore, according to the prayer of the petition, let the Master tax the costs decreed to be paid by the defendant to the plaintiff, and when it is so taxed, let them be paid to her, to empower her to go on with the cause.

Cafe 269. *The Charitable Corporation versus Sir Robert Sutton and others,*
August 13, 1742.



LORD CHANCELLOR,

The bill was brought to be relieved against the defendants as committee-men, or in other offices, and to have a satisfaction for a breach of trust, fraud, and mismanagement.

THE end of the plaintiff's bill is to be relieved against the defendants, who are fifty in number, and were either committee-men, or in other offices, and to have a satisfaction for a breach of trust, fraud, and mismanagement.

and to have a satisfaction for a breach of trust, fraud, and mismanagement.

gott. v. Rowall.
11. 428. n.

The corporation took its rise from a charter of the crown.

Sty. v. v. v. v. v.
11. 428. n.

The stock by the charter is not to be less than 20,000*l.* at time, or more than 30,000*l.*

Sty. v. v. v. v. v.
11. 428. n.

Several powers were granted for carrying on the affairs of the corporation, and seven persons appointed under the name of committee-men.

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It restrains the company from banking, unless with notes payable on demand, and confined within the amount of the stock.

Sty. v. v. v. v. v.
11. 428. n.

These are the material powers.

Sty. v. v. v. v. v.
11. 428. n.

The intention of it is extremely plain, to assist poor persons with sums of money by way of loan, to prevent their falling into the hands of pawnbrokers, &c.

Sty. v. v. v. v. v.
11. 428. n.

In 1724, by the King's sign manual the stock was enlarged to 100,000*l.* in 1728, to 300,000*l.* and in 1730, to 600,000*l.*

Sty. v. v. v. v. v.
11. 428. n.

I cannot help observing, as I go along, that this deviation from the original fund, was a handle for all the mischiefs which happened afterwards.

Sty. v. v. v. v. v.
11. 428. n.

One key of the warehouse was to be in the custody of the warehouse-keeper, another in the cashier's possession, and a third in the book-keeper's, that each might be a check upon the others.

Sty. v. v. v. v. v.
11. 428. n.

There was another officer, called the surveyor of the warehouse, whose business it was to examine all the pledges taken in by the warehouse-keeper.

If there was any defect of the goods in value, the warehouse-keeper was to make it good out of his own estate.

It has happened that the most important of these rules was broke through by the court of committee.

The cashier was ordered to deliver over the key of the warehouse to the accountant.

In 1726, John Thompson was appointed Warehouse-keeper: he was ordered to deliver over to the messenger and common servant the key of the warehouse.

September 1726, the surveyor of the warehouse was discharged, and was never any appointed afterwards; so that all the upon the warehouse-keeper were taken away. afterwards Mr. Woolley and Mr. Warren were appointed to the warehouse-keeper.

It does not appear to me, that these persons were any check at in the warehouse-keeper, for they gave no security to the corporation, but are rather to be considered as his servants than the of the corporation.

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That, from this time, the whole power of pledging, &c. had upon these three persons; and from hence the scene of began, the lending more money upon old pledges, withholding in the first sum lent.

The general and most destructive method was advancing several times upon old pledges, which were not worth than the first sum lent, or else giving credit upon impledges.

The corporation lent out to Thompson himself, upon these us pledges, large sums of money, notwithstanding he had sole management of these pledges, so that he might be said both borrower and lender.

Woolley and Warren were permitted to act as brokers for the corporation, and three parts in four of the loans were transacted in their names.

The court of committee took notice of this as an abuse; and they had printed advertisements, giving directions to persons to go to them, in order to monopolize the whole brokerage, which the committee made an order, that all persons employ their own brokers; and yet, notwithstanding this, the committee afterwards made Woolley and Warren assistants to the warehouse-keeper.

The losses which ensued from this mismanagement is prodigious: the witnesses have proved very clearly that the money is 385,000 *l.* whereas the value of the goods pledged was worth more than 35,000 *l.* so that the loss to the corporation is less than 350,000 *l.*

The material consideration for me is, from what causes, and what persons, this loss may be said to arise.

A set of persons are clearly liable, those who lent the money to the corporation upon fictitious pledges: there were a confederacy, or rather conspiracy, who passed in the cause the name of the partnership of three, or the partnership of four or five.

Lord Hardwicke then stated the evidence of John Thompson, warehouse-keeper, who was examined for the plaintiffs.

It was proved by him, that there was a partnership of five, under the name of carrying on a project of mines in Scotland; and that the committee knew how the account of the pledges except this partnership of five, four, and three.

The defendants have objected to his evidence, because he was not principally in the fraud, and run away out of the country in order to avoid justice; and besides that, by an act

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The CHARITABLE CORPORATION
V.
SUTTON.

of parliament made in the 6th. year of *Geo. 2. ch. 2. Thompson* intituled to one fifth of what he shall discover of the company's effects.

It is very true, this is a legal objection, and though he is not a good witness with respect to the five partners, who have not examined him, yet he is certainly a good witness against such of the defendants as have cross examined him, and who have thought proper to read his deposition.

The grounds upon which the plaintiffs found their relief against the committee-men are these :

1st, That they have been guilty of manifest breaches of trust, or at least of such supine and gross negligence of their duty, and so often repeated, that it will amount to a breach of trust.

These are great and important questions.

It will be proper to state what are the actual breaches of trust.

1st, Passing of notes, &c.

2dly, Signing notes for loans upon pledges, called renewed pledges, though they knew at the same time that the money originally lent was not paid.

3dly, Signing notes of *John Thompson*, warehouse-keeper.

4thly, Taking off all the checks upon him, &c.

5thly, Making several orders to put it in the power of *Thompson, Warren, and Woolley*, to commit those frauds.

As to the three first, they are actual breaches of trust, and the committee-men are clearly guilty who have been concerned in them.

The *bye-law* prescribes, that when notes were to be issued by the cashier, they should be signed by one of the committee-men, and intended as a check upon the warehouse-keeper and cashier.

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Now several notes have been issued, without observing this rule, which is an express contravention of the bye-law.

A registry of pledges was kept, in which an entry is made of the value of the goods pawned : after this was done, a new loan is made upon the same pledge, to the same person, and a reference to the old number in the registry upon every new advance ; so that it may be called a *pedigree of loans through twenty descents*.

Now it is not in the nature of the thing possible to suppose, that the same person wanting to re-borrow could replace the first money lent ; and therefore at the out-set was a plain and obvious fraud.

I shall therefore direct an inquiry into the value of the goods in general which have been pledged.

As to the third breach of trust, the committee-men's behaviour, with regard to *Thompson* their warehouse-keeper.

It is such a notorious fraud, or at least gross inattention, to suffer him, who was to set a value on all the pledges, to borrow money upon them himself ; that, I shall direct those who shall appear to be guilty of it to make good the loss.

As to the fourth and fifth breach of trust, the taking off all checks upon *Thompson*, and making several orders to put it in the power

power of *Thompson, Woolley, and Warren*, to commit those audits.

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They are not so clearly breaches of trust, though at the same time they appear to me to have tended greatly to the loss and prejudice of the corporation.

But whether they are criminal will be the question? Now I think the persons present are only liable who issued out the orders, which invested *Thompson, Woolley, and Warren*, with such powers.

But then another head of charge has been made, under the *assa negligentia*, which has been divided into these several inches:

1st, The committee-men's non-attendance upon their employment.

2dly, Their not observing the bye-law of law of laying the balance of cash regularly before them.

3dly, Not taking any notice of forfeited pledges.

4thly, Never once inspecting the warehouse to see what number of real pledges were there. [405]

5thly, Putting the whole power into the hands of *Thompson, Woolley, and Warren*.

Now from all these an accumulated charge is made against the whole body of directors or committee-men.

Consider first the foundation of this general charge.

I take the employment of a director to be of a mixed nature: it partakes of the nature of a publick office, as it arises from the charter of the crown.

The office of a director is of a mixed nature, publick as arising from the charter

a crown, but at the same time is not an employment that affects the publick government, for none of the directors of the great companies are required to qualify by taking the sacrament.

But it cannot be said to be an employment affecting the public government; and for this reason none of the directors of the great companies, the *Bank, South-sea, &c.* are required to qualify themselves by taking the sacrament.

Therefore committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation.

Committee-men are properly agents to those who employ them in the

trust, to superintend the corporation affairs.

In this respect they may be guilty of acts of commission or omission, of malfeasance or non-feasance. *Vide Domat's Civil Law* upon this head, 2 B. Tit. 3. Sec. 1 & 2.

Now where acts are executed within their authority, as relating bye-laws and making orders, in such cases though attended with bad consequences, it will be very difficult to determine that these are breaches of trust.

For it is by no means just in a judge, after bad consequences are arisen from such executions of their power, to say that they saw at the time what must necessarily happen; and therefore are guilty of a breach of trust.

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A gross non-attendance in a committee-man may make him guilty of the breaches of trust committed by others.

Next as to *mal-feasance* and *non-feasance*.

To instance in non-attendance; if some persons are guilty of gross non-attendance, and leave the management intirely to others, they be may guilty by this means of the breaches of trust that are committed by others.

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A trustee's saying he had no benefit from the trust, but merely honorary, is no excuse for his want of diligence

By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely *honorary* (1); and therefore they are within the case of common trustees. *Vide Coggs v. Bernard*, 1 Salk. 26.

Another objection has been made, that the court can make no decree upon these persons which will be just, for it is said every man's non-attendance or omission of his duty is his own default; and that each particular person must bear such a proportion as is suitable to the loss arising from his particular neglect, which makes it a case out of the power of this court.

Now if this doctrine should prevail, it is indeed *laying the axe to the root of the tree*.

Where a supine negligence appeared in all the committee, by which a complicated loss has happened, they are all guilty.

But if, upon inquiry before the Master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty (2).

A court of equity can lay hold of every breach of trust, be it in a publick or a private capacity.

Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private, or public capacity.

There can be no injury but there must be a remedy as the tribunals of this kingdom are wisely formed both of courts of law and equity.

The tribunals of this kingdom are wisely formed both of courts of law and equity, and so are the tribunals of most other nations; and for this reason there can be no injury, but there must be a remedy in all or some of them; and therefore I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination.

In the present case one thing is clear, that Sir *Archibald Grant*, *Robinson*, *Thompsen*, *Burrows*, and *Squire*, who were the five that were engaged in that confederacy, are certainly liable to make good the losses which the corporation have sustained in the first place, and the committee-men who were not partners in this affair are liable in the second place only.

Though the committee were not privy to the original fraud, yet they are guilty in the second degree, by neglecting to use the power invested in them, to prevent the ill consequences arising from such a confederacy.

Therefore, in the present case, I am of opinion, if there is no evidence to charge the committee-men of being privy to the original design, yet they will be guilty in the second degree, by con-
nivance at the affair, and not making use of the proper power invested in them by the charter, in order to prevent the ill consequences arising from such a confederacy.

THE CHARITABLE CORPORATION V. SUTTON.

I shall begin with such of the defendants as ought to be dismissed, against whom the bill cannot be supported, and then his lordship named some few of them only.

I shall direct the Master to inquire who were the committee-men at signed notes to *Thompson* the keeper of the warehouse, for they must be responsible for the losses arising from thence, which must be made good by them or their representatives.

I do likewise declare those committee-men to be liable who have issued notes upon loans called renewed pledges, without being signed, and the losses from it to be made good by them or their representatives.

The Master must also state the whole loss the corporation has sustained; and for the better discovery let all books and papers produced by the several defendants upon oath, and let the plaintiffs by their proper officers produce books and papers on the oath of the said officers.

The late Mr. *Aylmer* being a committee-man, let his representative appear before the Master to be examined as to the hands principal had in this affair, and to produce all papers in his custody relating to it.

All other matters must stay until the cause comes back upon the Master's report.

Ex parte Ludlow, August 13, 1742, in Lunatick Petitions. Case 270.

THE committees of the lunatick's estate, who are intitled to it themselves after his death, did, upon repairs being wanting in the real estate for barns, &c. chuse rather to lay out money in buying timber than take it off the estate, notwithstanding there was timber upon it proper for this purpose.

LORD CHANCELLOR,

I am of opinion, that committees of the real estate of a lunatic may exercise the same power over it in regard to cutting timber and repairs, as any discreet person who was the absolute owner of might do: and therefore the committees of this estate, must make good this sum of 25 l. to the personal estate, for they appear to me to have done this merely with regard to their own interest, as the reversion of the real estate belongs to them.

A committee of a lunatick's real estate may cut down timber for repairs (1).

El. Heston v. Bury, 1 (Dunm.) 33

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(1) *Vide Sergison v. Sealey, post. 414. Ex parte Bromfield, 3 Bro. Cha. Rep. 510.*

Adges versus Cardonnel, in the Paper of Exceptions, October 1742. Case 271.

LORD CHANCELLOR,

Custodium is where a person in *Ireland* is sued to an outlawry, and the plaintiff in the action, upon an application to the Court of Exchequer there, has, by virtue of a *custodium* issuing from thence, the possession of the lands belonging to the outlaw.

A custodium is the possession of lands belonging to an outlaw, granted to the plaintiff by the Court of Exchequer in *Ireland*.

Where

HEDGES v.
CARDINALL.

Where the party who takes the exception did not lay a material piece of evidence, which he had then in his power, before the Master, to which the error in the Master's report is owing, the court will not direct the Master to review his report, upon any other terms than the exceptant's giving up his deposit.

Where the error is a Material report is owing to a party, not laying a material piece of evidence before him, the court will not direct him to review his report, but upon the exceptant's giving up his deposit.

On an appeal from the *Rolls*, the appellant may be let into new evidence, which was not read there, provided he will give up his deposit.

For it turns upon the same reasoning as in the case of appeals from the *Rolls*, where upon a petition, the person appealing may be let into new evidence, which was not read at the *Rolls*; but then as it was entirely his fault, that it was not read there, it will not be allowed him upon any other terms, than giving up his deposit.

Case 272.

Humphrey versus Morse, October 15, 1742.

An heir is intitled to his costs (1), for it is the law which casts the descent upon him; otherwise as to an executor, because he may renounce (2).

A Bill was brought against the executor, and heir at law for an account of real and personal assets; and the doubt was, whether the heir at law should be allowed his costs.

LORD CHANCELLOR,

Executors shall not have costs, because they may renounce, but it is the law which casts the descent upon the heir, and that differs his case from executors, and if he has accounted justly for such money as is come to his hands, it certainly intitles him to his costs; and therefore I shall direct accordingly.

(1) *Bidulph v. Bidulph*, 2 P. W. 235.
Luxton v. Stephens, 3 P. W. 373. *Webb v. Claverden*, post. 424. *Berney v. Eyre*, post. 3 vol. 387. *Blower v. Morrets*, post. 3 vol. 772.

(2) *Vide Eq. Abr.* 125. note (a).
Humphrey v. Moore, ante 108. *Uvedale v. Uvedale*, post. 3 vol. 119.

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Sir John Robinson versus Cumming, October 16, 1742.

Case 273.

If a person who makes addresses on a view of marriage, and a reasonable expectation of success, gives presents, and the lady deceives him afterwards, the presents ought to be returned, or the value of them allowed.

IT came before the Chancellor upon exceptions to a Master's report, who had allowed the defendant 120 l. the value of presents he had made formerly to the plaintiff's wife.

For where made to introduce a person only to a woman's acquaintance, he is looked upon in the light of an adventurer; and if he loses by the attempt, must take it for his pains, especially where there is a disproportion between the lady's fortune and his.

The case which the defendant makes is this, that he being a particular friend of Mr. *Sheffield's*, the grandfather of Mrs. *Robinson*, who was about sixteen at the time of his death, had made her several

several valuable presents; and that Mr. *Sheffield* by his will has expressly devised his whole estate to the defendant, in case he should marry his granddaughter, which shews that he approved of the match, and had likewise made him executor.

ROBINSON v.
CUMMING.

See Booth

The plaintiff insists, that the defendant had insinuated himself so much into the favour of this old man, and that the young lady had never given him the least encouragement, as his circumstances were by no means equal to hers, she being a very great fortune, and he having only 100 *l.* *per ann.* at most.

Leicester.

1 Mem. 24.

Thames v. Barber

1 S. & Stuart. 5.

Booth

Leicester

3. 1841. 24.

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Arbuckle v. Smith

1 Collyer. 2.

LORD CHANCELLOR,

I think, in cases of this nature, these rules may be laid down, that if a person has made his addresses to a lady for some time, upon a view of marriage, and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him: but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to win her favour, I look upon such person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore, like all other adventurers, he will run risks, and loses by the attempt, he must take it for his pains: the defendant's case, upon all the circumstances, shewing a good deal of this sort, I am of opinion the Master ought not to have allowed him the value of the presents; and therefore the plaintiff is right in the exception.

There were other exceptions in the same cause.

At the time of the decree, the court directed that Mr. *Cumming* should be allowed, upon his oath, such sums as he had expended in a cause relating to Mr. *Sheffield's* will.

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An exception was taken to the affidavit, that it was too loose, Mr. *Cumming* swearing only, that he had expended the several sums contained in his account, to the best of his knowledge, remembrance, and belief; and that, in several of the *items*, he does not mention the time it was paid, nor to whom, or for what the sums were paid.

LORD CHANCELLOR,

The exception must be allowed, because where at law a person upon an account is allowed sums under 40 *s.* on his oath, it is not sufficient that he swears to his belief only, but he must swear the fact: so in directions under a decree, that the person upon an account should be allowed such sums as he swears he has actually expended; it is not sufficient, as in this case, that he believes he paid them, but he must peremptorily swear to the fact.

When at law a person in an account is allowed sums under 40*s.* on his oath, he must swear positively, and not to his belief only; the same directions as to this matter are given

under a decree in this court, that he must peremptorily swear to the fact.

Though a Master, under such direction as in this decree, has implied power of settling the affidavit the person is to make, &c. to put it out of all doubt, I will specify it now; and will direct the Master to review his report, and to give Mr. *Cumming*

ROBINSON v.
CUMMING.

Cumming an opportunity of clearing up the doubts that arise upon the account.

Another exception, that Mr. *Cumming*, in his account, ought to have made annual rests; and that from time to time he should have applied the assets as they came in, to pay off some part of the principal and interest due upon his own bond, and not charge a gross sum in one item for fifteen years interest.

LORD CHANCELLOR,

The court directs annual rests in an account of the rents of real, but not of personal estate.

In the common directions for taking an account of the rents and profits of real estate, the court have directed *annual rests* to be made, but not in account of personal.

A mortgagee by entering into possession, by his own act makes himself accountable; and it is in this case the direction of annual rests is given.

For if a mortgagee enters into possession of the estate, he does by his own act render himself accountable for what he receives, in discharge of his principal and interest, and it is in this case that the direction of annual rests is made (1).

[411] But if a mortgagor comes with only half the debt, and offers it to the mortgagee, he is not obliged to take it.

The present case of an executor is quite different, for it is not an office of his own seeking, but very proper that somebody, either as executor or administrator, should collect in the assets, and if he happen to be a bond-creditor himself, the court never direct, that if any sums come into his hands, that he should from time to time, by piecemeal discharge the principal and interest of his bond; for he may first discharge all other demands against his testator's estate before his own; and unless it had appeared that a considerable sum was left in his hands, sufficient to pay off his bond entirely, over and above what was due upon other demands, there could be no ground for this exception; and therefore over-ruled it.

An executor, by an established rule of law, may retain to pay his own debt, but is not obliged to take in part, where there are not assets enough to pay the whole.

As to what Mr. Attorney General says, that upon a *plene administravit*, if it had appeared there was enough only to pay half the debt in the executor's hand, the jury must have found a verdict against him, it cannot be supported, for no court would have directed a jury to give such a verdict, because an executor, by an established rule of law, may retain to pay his own debt (2), but is not obliged to take in part only.

The defendant took an exception, that the Master had not allowed him any interest on two years and a half arrears of an annuity, which he had purchased of the testator Mr. *Steffield*.

It was a grant of an annuity by way of mortgage, and a power to the annuitant to enter, in case of arrears, and to hold till he was satisfied all arrears, and all his costs and damages, but in this case the annuitant has not entered for default of payment.

(1) *Gould v. Tancred*, post. 534. (2) 1 Roll. Abr. 922. (L) pl. 1. 10 Mod. 496.

ORD CHANCELLOR,

there is no instance where the court has ever allowed interest in the arrears of such an annuity; if, indeed, the annuitant entered, and been in possession of the estate charged with it, the court would not have obliged him to have quitted the possession unless the grantor had agreed to allow him interest for the arrears of this annuity down to the day (1).

quit the possession, till the grantor allows him interest for the arrears of his annuity.

ROBINSON v. CUMMING.

Where an annuitant has entered, and is in possession of the estate charged with it, the court will not oblige him to

Ferrers versus Ferrers, (*Vide Cas. in the time of Lord Ch. Talbot*) was different from this, because it was her jointure, and rest upon the arrears of the annuity was allowed her by way of maintenance, and as a compensation for the debts she had contracted in the mean time; therefore this exception must be over-ruled.

(1) See *Drapers' Company v. Davis*, ante 211. *Newman v. Auling*, post. 3 vol.

Sergeant versus Seoley, October 25, 1742.

[412]

Case 274.

THE R. Attorney General objected to the reading an inquisition of lunacy, because it is offered as evidence to affect the right of a third person, and as it likewise had a retrospect of 21 years.

An inquisition of lunacy is always admitted to be read, but is not conclusive evidence, for you may traverse it.

Lord Hardwicke over-ruled the objection, and said, that inquisitions of lunacy, and likewise other inquisitions, as *post mortem*, are always admitted to be read, but are not conclusive evidence, for you may traverse them if you please.

By the inquisition, the jury found Mr. Samuel Pitt a lunatic, without lucid intervals, eight years back, so that it took in the whole of the transaction with his son about laying out some part of his personal estate in the purchase of real for the lunatic's benefit.

The two witnesses to encounter the inquisition and to prove Mr. Samuel Pitt's sanity, (one of which was his apothecary), swear, understanding, at the time of this transaction, was somewhat affected from his paralytick disorder, but that it did not totally deprive him of it; and that his memory would serve him to give answer to a short question, but not to one of any length.

The principal point was, Whether money belonging to a person, who is supposed to be a lunatick, and which has been laid out in land, does not still belong to those persons who would have been intitled to the money at the time it was converted into real estate; and whether the property of a lunatick can be altered by respect whatsoever; or whether this court can give it to a person more representative than the law would have done. *Vide Pitt versus Ridler, Eq. Cas. Abr. 279.*

position that has been made of this sum of money, but the purchase will stand.

It is objected
by
Drury 33.
Pitt
Bosington
7. Nov. 396
43. Dec. 1744.

Where, before an inquisition of lunacy, a person who was found a lunatick, has made a purchase with the approbation of his only son, the court will not change the disposition.

LORD

SERGEON VS
SEALEY.

LORD CHANCELLOR,

The general question in this case is, Whether there is sufficient ground in a court of equity to set aside this purchase, which cost 1021 l. and to consider it as personal estate?

A lunatick is certainly capable of taking by way of grant (1), and therefore this estate has vested in Mr. *Samuel Pitt*, and might descend from him.

I will consider first, whether, upon making this purchase in 1724, this gentleman was *non compos mentis*.

[413]

There is not at present before me, sufficient evidence to satisfy me, that he was absolutely a *lunatick*, or *non compos*.

As to the inquisition, the jury have carried it too far, in finding him a lunatick, as his incapacity was owing to a distemper; they should have found that he was not capable of managing his own affairs, and not properly that he was a lunatick.

When I admitted the inquisition to be read, I said it was not conclusive evidence; for it is not conclusive as to the point of time of taking the inquisition, much less as to the retrospect of eight years, for, notwithstanding such inquisition, there are numerous instances of a subsequent inquiry.

The evidence before me is, that he lived with his own family after he had the paralytick disorder, as well as before, and that he was assisted in the management of his affairs by his only son and his steward.

And at the very time the purchase was depending, the supposed lunatick himself rode out to inspect the estate which was intended to be bought.

Now, can it be supposed, that the family would have made all this unnecessary parade, if they had not thought Mr. *Pitt* capable of judging.

There are a great many instances of apoplexies turning to paralytick disorders, which may at first affect only the members and organs of the body, and by degrees, as the weight of the distemper increases, may affect the memory and understanding.

In 1724, this purchase was made, and the inquisition was not till 1726, two years after; and though the jury, out of a necessary caution, have found it with a *retrospect* of eight years, in order to take in alienations; yet I shall not, for that reason only, direct a further inquiry.

The purchase appears to have been a reasonable act, and no evidence to shew it otherwise, and yet it is said, Mr. *Pitt* being a lunatick at the time, the court will not vary the property (2), and has been compared to the case of infants.

It is true, in the case of infants it is so (3); and upon application to the court to lay out part of their personal estate in land,

Where there is an application to the court to lay out part of an infant's personal estate in land, if he dies before 21, or does not approve when he comes of age, the property will not alter.

(1) *Co. Litt. 2. b. Perk. f. 51.*

(2) *Ex parte Murchionefs of Annandale, Amb. 80. Ex parte Grimstone, Amb. 706. Vide etiam ex parte Bromfield, 3 Bro. Cha. Rep. 510.*

(3) *Vide Tullit v. Tullit, Amb. 370. Inwood v. Tawne, Amb. 417.*

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always granted with a *salvo*, that if the infant dies before 21, his not approve of the purchase when he comes of age, that property shall not alter.

But the case here is quite different, the person lives in his own family as he did before this paralytick disorder, and also consents to the purchase two years before any legal inquisition into his capacity; and would it be right in the court to overturn acts that done with the concurrence of the whole family, and in a reasonable manner? If I did, I am sure it would be attended with numerous inconveniences.

Here is in this case the strongest circumstance in the world; one son, who must have been heir of the real estate, if not possessed of otherwise, and intitled to the personal estate if his brother, the supposed lunatick, died intestate.

Though it is very true, the court will not order the personal estate of a lunatick to be turned into real estate, yet there have been applications to this court to lay out part of his personal estate in repairs (1), or even upon improvements of his real estate, and the court have allowed it, if the next of kin at that time, who if he was dead would be intitled to his personal estate, did not shew any reason against it; and such an order of the court has been even binding upon other persons who were not consented to the order at the time it was made, but happened to be the next of kin at the lunatick's death.

Therefore, as this purchase was a reasonable act, and done with the approbation of the only son, and as the court ought especially to give the turn of the scale in favour of an heir, I am of opinion there are no grounds for the court to change the disposition that has been made of this sum of money, but the purchase must stand.

There was another point made in this cause (2).

William

1) *Vide ex parte Ludlow, ante 407.*

2) The state of this part of the case in the Register's book is as follows: on the marriage of *Jane Palmer* with *William Pitt*, *Jane's* estate was settled on *William Pitt* for life, remainder to first and other sons in tail, remainder to the right heirs of *William Pitt*. There was a power for *Jane* to charge the estate with 4000*l.* for such persons as she should by deed or will duly executed appoint. This settlement was dated 29 30th October, 1717. *William Pitt* died in 1725, leaving *Samuel* his son, who was an infant in 1738. Mrs. *Sergeon* is at law both to *William Pitt* and to the infant, on whom the remainder of the above estate has descended. In August 1731, *Jane* makes her will attested by three witnesses, and makes

a disposition of the 4000*l.* chiefly in favour of her son *Samuel*. In January 1731, previous to her marriage with the defendant *Speke*, *Jane* enters into articles, whereby she declares, that it shall be lawful for her intended husband to raise 2000*l.* (part of said 4000*l.*) for his own use; and *Speke* covenants to convey lands for securing the said 2000*l.* but in trust nevertheless to permit *Speke* to take the profits of those lands during his and *Jane's* lives, and then in trust, for raising the said 2000*l.* for the younger children of that marriage: if no children then for *Samuel*. A power was reserved to *Jane* to make a disposition of the other 2000*l.* and the rest of her personal estate by her will. The number of witnesses to these articles does not appear. Mrs. *Speke* makes

The court have allowed part of a lunatick's personal estate to be laid out in repairs, and even upon improvements of his real estate.

SERGEON V.
SEALEY.

William Pitt the son of *Samuel Pitt* married Mrs. *Speke*, and by the marriage articles it was covenanted that if there should be one son only, and no younger children, and the wife should survive the husband, that she should have the power of disposing of 4000*l.* by deed or will executed in the presence of three witnesses to any person she should appoint, and this sum was to be a charge upon the real estate of the husband.

power of disposing of 4000*l.* by deed or will, executed in the presence of three witnesses, and this sum was a charge on the real estate of the husband.

Before her second marriage, she, by articles executed in the presence of two witnesses only, appointed 2000*l.* out of the 4000*l.* to be for the use of her intended husband; the remaining 2000*l.* she disposed of by will, but does not execute it in the presence of three witnesses. Lord *Hardwicke* held, that the articles were a good appointment of the 2000*l.* for the benefit of her second husband.

[415] *Mr. William Pitt* died, leaving only one son *Samuel Pitt* the younger, who lived to be only nineteen, and dying before he came of age, his real estate descended upon *Mr. Sergeant*, the

makes a codicil duly executed, and thereby confirms her will and gives the residue of her personal estate to her son *Samuel*. There was no issue of the marriage. The defendants *Speke* and *Cruise* (who are executors to *Samuel* the infant) insist, that so much of the 4000*l.* as was not appointed by the articles in favour of *Speke*, is a charge upon the real estate descended to the plaintiffs, and ought to belong to them as executors of *Samuel* by virtue of the aforesaid will and codicil of Mrs. *Speke*. "As to the sum of 4000*l.* which *Jane Pitt* by virtue of the settlement 30th *October* 1717, had a power to charge on her own real estate his Lordship declared, that the same is a charge on the said real estate, and his Lordship directed the Master to compute interest on the sum of 2000*l.* part of said sum of 4000*l.* from the end of one year after the date of said articles of 27th of *January* 1731, at the rate of 4*l.* per cent. *per annum*; and to take an account of the rents and profits of the premises, whereon said sum of 4000*l.* was charged, which accrued from the end of one year after the date of said articles, which were received by the defendant *Speke*, (he having married *Jane* the mother and guardian of said infant *Samuel Pitt*); and what shall be coming on account of said rents and profits is to be applied towards keeping down the interest during the life-time of said *Samuel Pitt* the infant: and his Lordship declared, that the sur-

" plus of the interest of the said sum of 2000*l.* which accrued during the life-time of said *Jane*, late the wife of the defendant *Speke*, belongs to said defendant *Speke*: and his Lordship directed the Master to compute interest on the sum of 2000*l.* residue of said sum of 4000*l.* from the time of the death of said *Jane* late wife of said defendant *Speke*, at the rate of 4*l.* per cent. *per annum*: and that the said principal sum of 4000*l.* together with so much of the interest for the sum of 2000*l.* part thereof at 4*l.* per cent. as shall not have been discharged by the rents and profits of said estate, during the life-time of said *Samuel Pitt* the infant, and the whole interest at the same rate from the time of his death, and interest for the sum of 2000*l.* residue of said 4000*l.* from the time of the death of said *Jane*, be raised by sale or mortgage of said estate; and the said principal sum of 4000*l.* when raised, to be paid into the bank in the name and with the privy of the Accountant-General, &c.; and the surplus interest of the said first mentioned sum of 2000*l.* part thereof over and above what shall have been discharged by the rents and profits received during the life-time of said *Jane*, is to be paid to said defendant *Speke*; the residue of the interest of said sum of 4000*l.* together with the principal is to be paid into the bank in the manner aforesaid." *Reg. Lib. B. 1742. fol. 599.*

plaintiff's

intiff's wife, who is great niece of *Samuel* the elder, and heir law to him, and to *William Pitt* his son, and to the infant *nuel* the younger, the grandson of *Samuel* the elder.

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After the death of Mr. *William Pitt*, Mr. *Speke* marries the dow, but, before her second marriage, she by articles executed in the presence of two witnesses only, appoints the sum of 1000 l. out of the 4000 l. to be for the use and benefit of her ended husband, during the coverture and after her death, to her son *Samuel Pitt*.

The other 2000 l. she makes a voluntary disposition of by will, but did not execute it in the presence of three witnesses.

LORD CHANCELLOR,

The question is, Whether the articles entered into upon Mrs. *Speke's* marriage with Mr. *Speke* amounts to an appointment within her power?

I am of opinion, that it is a good appointment of 2000 l. for the benefit of Mr. *Speke*; and notwithstanding it is insisted that it is a defective appointment, because there are only two witnesses, this court will supply the defect, where it is executed for a valuable consideration, much more where it is an execution of a will only: and though the appointment is inaccurately expressed, and in an informal manner, it shall still amount to a grant of the 2000 l. to Mr. *Speke*; and if it amounts to a grant, what is the defect? Why, that Mr. *Speke* shall have the whole use and benefit of it during the coverture; and falls exactly within the reason of *Lady Coventry's* case; where a tenant for life, with a power to make a jointure, covenants, for a valuable consideration, to execute his power, this court will supply a defective execution, or non-execution against the remainder man (1).

Though the appointment here was inaccurately expressed, and in an informal manner, yet being executed for a valuable consideration, this court will supply the defect.

The next question is, as to the remaining 2000 l.

This was not an appointment for a valuable consideration, but only a voluntary disposition, and therefore as the will under which the 2000 l. is given was not executed in the presence of three witnesses, it has not pursued the power, and consequently is a void appointment, so that this 2000 l. sunk in the infant's real estate.

The will under which the 2000 l. is given, being a voluntary disposition, as it has not pursued the power, by being executed in the presence of three witnesses, is a void appointment, and sinks into the real estate.

There is another question which relates to the interest of the 1000 l. appointed to Mr. *Speke*, by the articles before his marriage.

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And it is insisted, that from the time of the articles executed, interest commenced, and that it ought to have been kept down to the infant during his life.

It is maintained upon these grounds: 1st, That the infant was only tenant in tail, remainder in fee, and that the remainder in fee never coming into possession, he was liable to keep down the interest out of his personal estate; and 2dly, That the plaintiff should not be charged with it, because Mrs. *Sergison*, his wife, be-

(1) *Vide Coventry v. Coventry*, 2 P. W. Holt, 2 P. W. 648. *Harvey v. Harvey*, 1 Toller, v. Toller, 2 P. W. 490. ante 1 vol. 563. note 4. *W. v. Loyer*, 2 P. W. 623. *Holt v. Holt*, 2 P. W. 623. Vol. II. C c ing

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ing heir at law of the infant's father, as well as of the infant himself, has no occasion to claim through the infant at all, but may derive her title immediately from the father.

As to the first ground, to be sure there is that nicety in the law between a remainder in fee in reversion and in possession; but to say in equity, that the infant shall be compelled to keep down interest upon his own estate, of which he was seised of the remainder in fee, out of his personal estate, is such a nicety, that I cannot allow of by any means.

As to the second ground, I am of opinion Mrs. *Sergison* is obliged to shew her cousinage, through the infant, though in the descent she might derive the title from the father only.

I do not so much as remember an instance where even a tenant in tail has been obliged to keep down interest (1); but if he dies during his infancy, and the remainder in fee was limited to a stranger, it may possibly make some difference; but I will not determine now how the court would direct in that case.

In the present case had there been an application to the court in the infant's life, by his guardian, the court would have directed the interest of this 2000*l.* to be kept down out of the rents and profits of his estate, and not out of his personal estate: Suppose an infant, tenant in tail, remainder in fee, had nothing to support him but the rents and profits of real estate, and would starve if they were to be applied to keep down interest, I should not, in that case, have directed them to be so applied (2); but here there is a large personal estate, besides the rents and profits of the real estate, which makes the difference.

Therefore there must be an account taken of the rents and profits of the real estate of the infant, descended upon Mrs. *Sergison*, the wife of the plaintiff, and so much of them applied as will pay off the interest due upon the 2000*l.* appointed to Mr. *Speke*, which must be at the rate of 4 per cent. and commence from one year after the execution of the articles of appointment to Mr. *Speke*.

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(1) The reason of which is, because the remainder man or reversioner is considered as wholly in the power of the tenant in tail. *Chaplin v. Chaplin*, 3 P. W. 235. *Amesbury v. Brown*, 1 Ves. 477, 480. But the same reason does not hold in the case of an infant tenant in tail, because he cannot bar the remainders unless under the King's privy seal: therefore his guardian or trustees must keep down the interest. See the decree in this case *supra*. 1 Ves. 480. So a tenant for life is obliged to keep down the interest on incumbrances. *Hungerford v. Hungerford*, Gilb. Rep. 69. *Partridge v. Pawlett*, ante 1 vol. 467. *Revel v.*

Watkinson, 1 Ves. 93. *Tracy v. Hensford*, 2 Bro. Cha. Rep. 128. Where a tenant in tail pays off an incumbrance without taking an assignment, it is an exoneration of the estate; but where a tenant for life pays it off, he is considered as a creditor for the money so paid off: but in either case evidence of the intention or situation of the estate may be admitted to prove the contrary. *Kirkman v. Smith*, 1 Ves. 258. *Amesbury v. Brown*, 1 Ves. 477. *Jones v. Morgan*, 1 Bro. Cha. Rep. 218. *The Countess of Shrewsbury v. Earl of Shrewsbury*, 3 Bro. Cha. Rep. 120.

(2) *Rachel v. Watkinson*, 1 Ves. 95. *Saville v. Saville*, post. 463.

*Jewson versus Moulson, et c con. October 27, 1742.*Case 275.
S. C. cited post.

THE question, in both these causes, arises from the will of ^{515.} *Joseph Burr*, who at the time of making it had five children: "He thereby directs two freehold houses to be sold, and his whole estate to be turned into money; and after his debts and legacies are paid, the residue of the money he gives to the plaintiff and others, his executors, in trust, for the benefit of his four sons, and his daughter *Jenny*, to be divided equally between them; and if any or either of them die before the age of twenty-one, their share to go to the survivor."

of the principal of her fortune: on the 6th of December, 1742, Lord Hardwicke was of opinion, not to allow the defendant a creditor of Vobe's to receive his wife's fortune, without making some provision for her; and recommended it to him to give her, and her children, some

Harry Burr, one of the sons, died after the father, and before twenty-one, and consequently his share went over to the survivors.

On *August*, 1739, *Mr. Vobe*, who kept a tavern, married the daughter, but made no provision for her by way of settlement.

On *March*, 1739, *Mr. Vobe*, being justly indebted to the defendant *Moulson*, a wine merchant, enters into a bond for the payment of it; and about three weeks after, makes an assignment to *Moulson* of all the share which, in the right of his wife, was intitled unto, in her father's personal estate.

Afterwards he made a second assignment of his wife's said share, to trustees, for the benefit of all his creditors in general.

During all these transactions, *Jenny Vobe*, the wife of *Vobe*, daughter of *Burr*, the testator, was under age.

The executors have done no act to settle or make any division of the father's personal estate.

Mrs. Vobe has two children to maintain, as her husband is a bankrupt.

Her share under the will amounts to about 600*l.* and *Mr. Moulson's* debt to above 500*l.*

The question is, Whether the wife, who is totally unprotected for, shall not have a maintenance secured to her out of her share of her father's personal estate, before it is applied in payment of the defendant, *Mr. Moulson*, and the rest of the creditors of *Mr. Vobe*, the husband.

Mr. Chute, for the defendant, *Mr. Moulson*, cited *Tudor versus Savoyne*, 2 *Vern.* 270. *Mr. Brown*, of the same side, alleged it to be an established rule of this court, that a husband shall not meddle with the wife's fortune, unless he will, in the first place, make some provision for her; but the case of a creditor, he said, was very different, who has paid a full consideration for the assignment, and therefore it would be hard to make a stand in the place of the husband.

He cited *Miles versus Williams*, 1 *P. W.* 249. but relied chiefly on the case of *Bates versus Dandy*, July 16, 1741, before *Lord Hardwicke*, see p. 207.

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Mr. Attorney General, for the wife submitted two things.
First, The general rule of a court of equity, that if a husband is obliged to come here for a wife's fortune, he shall first make a provision for her, before he shall be allowed to meddle with it.

What, said he, is the ground of this rule, but that it is natural justice and equity, the wife should have some provision.

Secondly, This right runs along with the thing itself, and whoever comes in under the husband, must take it only as he would have done; and the true reason for the court's interposition is, the wife's being unprovided for.

No harm or injustice is done, because no body can take an assignment of the wife's fortune, but he must do it with his eyes open, and therefore it is his own fault, if he will lend upon such a security.

There is besides a strong circumstance in this case, for at the time the wife's share was assigned, it was not a vested interest, as she could take only upon the contingency of her living to be twenty-one.

There is also a strong argument to be drawn from the general inconvenience; for if the defendant, Mr. *Moulson*, should prevail, it would put it in the power of a husband to evade the rule of the court; for by assigning the wife's effects, he gets her fortune in his power, which he could not have upon an application to Chancery, without making a provision for her first.

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The Chancellor directed the cause to stand over, to look into the cases; and on *October* the 29th, 1742, it came on again.

The Attorney General for Mrs. *Vobe*, then cited the case of *Watson* versus *Maschal*, March 15, 1732, before Sir *Joseph Jekyll*, where he decreed a provision to a wife out of her fortune, against the assignees of a bankrupt. He likewise mentioned 1 *P. W.* 382. *Jacobson & al* versus *Williams*, and 1 *P. W.* 1735. *Richmond & Ux* versus *Talleur*. Mr. *Chute*, for the defendant, Mr. *Moulson*, cited 1 *P. W.* 458. *Bosvill* versus *Brander*.

The cause stood over again till *November* 3, 1742, when the Chancellor gave judgment.

LORD CHANCELLOR,

Here are two bills brought:

The first, by the executor of Mr. *Burr*, to be discharged of their trust, upon paying and assigning over *Jenny Vobe's* share of her father's personal estate, and that they may be indemnified in so doing.

The second bill is brought by Mr. *Moulson*, who claims a right to *Jenny Vobe's* share of *Burr's* personal estate, under the assignment from her husband.

As against the husband, the equity is extremely plain, and likewise against the assignees, who claim under the second assignment.

Therefore the principal question in the cause arises out of the defence made by the wife of *Vobe*.

Two points have been insisted on for her.

First

First, That the husband cannot come into this court for the fortune of the wife, without making a provision for her in the first place.

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Secondly, That there is an equity attached to the thing itself; and therefore the assignee of the husband takes it subject to the same equity (1); and from hence arises the greatest doubt.

As to the *first*, It is an equity grounded upon natural justice, and is that kind of parental care which this court exercises for the benefit of orphans; and as the father would not have married his daughter without insisting upon some provision, so this court, who stand in *loco parentis*, will not do it (2).

As a father would not have married his daughter without a provision, neither will this court, who stand in *loco parentis*, do it.

This court will not suffer the husband to take the wife's portion (though the ecclesiastical court, who have a concurrent jurisdiction with this, in regard to portions arising out of personal estate, have given their consent that the husband should have it) until he has agreed to make a reasonable provision for the wife; and in many instances have granted injunctions to stay the proceedings in the ecclesiastical court (3).

Where the ecclesiastical court have given their consent the husband should have the wife's portion, this court has granted an injunction to stay the proceedings *there*.

In *Totbill's* transactions in the high court of Chancery, in the case of *Tanfield contra Davenport*, 14 Car. 1. Lord Keeper *Comberbury* takes notice of this rule, which shews it is not a doctrine newly taken up, as has been supposed.

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But though this is so, yet if the husband can come at the chattels of the wife, without the aid of this court, or of a court having a concurrent jurisdiction, I do not know any instance where his court has interfered (4); as if the wife's debtor will pay her debt to the husband; so likewise where there is a bond debt to the wife, *dum sola*, and the husband recovers it at law, I do not now that this court have ever granted an injunction; for his suing at law was very proper, and therefore this court leaves it to its natural course, without meddling with a legal question; though if a bill was brought in favour of a wife, for an injunction to stay execution upon the judgment at law, I do not now whether this court would not grant it; but, as that point is not now before me, I will not determine it.

Where there is a bond debt to the wife, *dum sola*, and the husband recovers it at law, there is no instance of this court's granting an injunction, for the suit was proper at law.

Where a husband makes a voluntary assignment of the wife's portion, the volunteer stands in his place only; the same equity

in regard to executors, and the same as to assignees or bankrupts.

If one looks into the cases upon this head, it is difficult to reconcile them, though, indeed, one thing is clear, through them all; that if the husband makes a voluntary assignment of the

after the wife's death. *Scriven v. Tapley*, Amb. 509.

(1) *Tyrell v. Hope*, post. 558.

(2) *Milner v. Colmer*, 2 P. W. 641.

Idams v. Pierce, 3 P. W. 11. *Brown*

Elton, 3 P. W. 202. *Harrison v.*

Luckle, 1 Stra. 239. *Winch v. Page*,

Lamb 86. *Middlecome v. Marlow*, post.

20. But it seems this equity does not

extend to the children of the marriage

(3) *Vide Anon. ante* 1 vol. 491.

(4) *Milner v. Colmer*, 2 P. W. 641.

Fitzner v. Fitzner, post. 514. *Attorney*

General v. W'borough, 1 Ves. 538.

Dimmock v. Atkinson, 3 Bro. Cha. Rep.

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wife's portion, the volunteer must stand in the place of the husband (1); there is the same equity too in regard to *executors* and administrators, and the same as to *assignees of bankrupts*, for it is the law that casts it upon them, *vide* 2 *Vern.* 401. *Burnet versus Kinafton*, and 2 *Vern.* 564. *Taylor versus Wheeler*, and *Jacobson & al' versus Williams*, 1 *P. W.* 382 (2).

In equity, notwithstanding a doubt of Lord *Cowper's*, in the case of *Jacobson versus Williams*, it is now very well known, that a possibility may be both released and assigned.

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There is a particular train in the report of the last case, and it looks as if Lord *Cowper* rested his opinion chiefly upon the commissioners of bankrupts assigning a possibility, which he thought they could not do, but he was certainly wrong in point of law, for that not only the latter statutes relating to bankrupts mention the word *possibility*, but also because the 13 *Eliz. c. 7. sect. 2.* empowers the commissioners to assign all that the bankrupt might depart with; and besides, the 21 *Jac. 1. c. 19.* enacts, that the statute relating to bankrupts shall be construed in the most beneficial manner for creditors. *Vide Higden versus Williamfon*, at the *Rolls, Mich. 1731*, and affirmed by Lord Chancellor *King*, in *Mich. 1732* *; and in equity it is very well known, that a possibility may be both released and assigned.

The next case is *Watson versus Mascbal*, March 19, 1732, before Sir *Joseph Jekyll*, who decreed exactly upon the same reasoning as in the case of *Jacobson versus Williams*.

Where the husband assigns the wife's trust of a term for a valuable consideration, the assignee need not make a provision for the wife, before he is intitled.

Yet, where the wife's trust of a term has been assigned by the husband for a valuable consideration, there the determination has been contrary, and the rule has been, that the assignee should not make a provision for the wife before he could be intitled. *Tudor versus Samyue*, 2 *Vern.* 270 (3).

There was some dispute at the bar, how *non allocatur* at the end of this case is to be applied, whether to the whole case, or the words immediately preceding; but, from what I

(1) See *Bates v. Dandy*, ante 208. note 2.

(2) *Roswell v. Brander*, 1 *P. W.* 459. *Ex parte Conyngame*, ante 1 vol. 192. *Grey v. Kentish*, ante 1 vol. 280. *Worral v. Mar-ar*, and *Bushnam v. Peils*, 1 *Cox's P. W.* 459. note. *Middlecombe v. Marlow*, post. 520. *Tyrel v. Hope*, post. 558. *Paul v. Birch*, post. 622. In the case of *Shudall v. Jekyll* (post. 516.) Mr. *Shudall*, before he had received the legacy of 1000*l.* left to his wife, died, leaving the plaintiff, his widow, an infant, who insisted, that the legacy did

not belong to the executor of Mr. *Shudall*, but survived to her: for as Mr. *Shudall* had made no provision for her, and as the Court would not have decreed the legacy to him, without his making a settlement upon her, so his executor could not be in a better situation than himself. His Lordship decreed the legacy to the plaintiff. *Reg. Lib. B.* 1742. fol. 184.

(3) 3 *Cha. Rep.* 223, 224. Sir *Edward Turner's* case, 1 *Vern.* 7. *Pitt v. Hunt*, 1 *Vern.* 18. *Bates v. Dandy*, ante 208. *Contra Hard.* 496.

* 3 *P. W.* 132. In that case it was determined that a contingent interest or possibility in a bankrupt is assignable by the commissioners; thus a devise was to such of the children of *A.* as should be living at her death: *A.* had issue *B.* who becoming a bankrupt, gets his certificate allowed; after which *A.* dies; this contingent interest is liable to the bankruptcy, for as much as the son in the mother's life-time might have released it.

have

e mentioned before out of *Totbill*, it is applicable only to the preceding words.

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The next case is *Walters versus Saunders*, *Eq. Caf. Abr.* 58.

The next is *Bosvil versus Brander*, 1 *Wms.* 458.

The next is *Bates versus Dandy*, *July* 16, 1741 (1).

In these cases you observe the particular contract of the husband, for a valuable consideration, has got the better of the wife's duty to have a provision.

The ground of Sir *Edward Turner's* case, 1 *Vern.* 7. was this, it as the husband, at law, could dispose of a term for years, so may he dispose of the trust of a term, because the same rule of property must prevail in equity as well as at law; but *vide* the case of *Pitt versus Hunt*, 1 *Vern.* 18. where Lord Chancellor *Stingham* expressed great surprize at this resolution.

As at law, the husband could dispose of a term for years, so may he dispose of the trust of a term; for the same rule of property must prevail in equity as well as at law.

Now, I apply the reason of these cases to the present.

As to the last of the assignments, it does not differ from the case of assignments of bankrupts, for it is the case of a failing man, and exactly under the same reasoning as an assignment of a bankrupt's effects for his creditors in general; for here he assigns his right, title, &c. and therefore is exactly upon the same footing.

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As to the first assignment to the defendant Mr. *Moulson*, to be sure, that is different from the other, and likewise differs in several circumstances from all the cases cited.

In the first place, here is a mixed fund arising out of real as well as personal estate; for though the father, indeed, by his will, directs the estate to be sold and turned into money, yet all the children together, when they came of age, might have directed to the trustees of the will, let us take the real estate as it is, notwithstanding the testator directs it to be sold.

Besides, the wife was an infant when she married, and likewise during all these transactions, and consequently a particular object of the care of this court.

Besides too, this is not an assignment of a term for years, or a specific thing, but an assignment at once of all her fortune, and which the husband could not reduce into possession, without the assistance of this court; neither has there been any division in the world made, or even an account taken of the testator's estate, which could bind the parties.

This differs from the other cases, for the husband at once assigned all the fortune, and which he could not reduce into possession without the assistance of this court.

The trustees themselves, though willing to have joined with the husband, could not have bound the wife, as she was an infant, and as there is likewise a clause of survivorship in the will; and therefore there is no possibility of coming at the fortune, without the aid of this court.

For this reason the defendant Mr. *Moulson* must be presumed to have known all the circumstances of this security, and what the rule of equity is in regard to provisions to be made for a wife out of her fortune.

(1) *Ante* 207. S. C.

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The material point was the assignment of the whole portion, and if such a practice should be allowed, it would defeat all the care of the court with regard to infants.

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In the present case, I lay a very great weight upon its being an assignment of the whole portion, and if I should allow this practice to prevail, it would trip up all the care and caution of this court with regard to infants; for a husband then would have nothing to do but to take up money of a third person; and though neither he nor the lender know exactly at the time what the fortune is, yet he may assign it over, and so defeat the care of the court intirely.

*Consider too, the particular circumstances of this case; the husband was in debt before he married; runs away with this young woman clandestinely, without the consent of any of her relations, with a view, very possibly, to prevent his being arrested.

To this it may be objected, that if I decree a provision for the wife, people will not venture to lend their money, which would be a great detriment to the public in general, and to trade in particular.

To which I answer, that though this court should not ratify and legitimate such assignments, yet there will be persons enough found to risque their money upon such securities.

Therefore, I am of opinion not to allow the creditor to receive the whole fortune of the wife, without making some provision for her (1); and I would recommend this method to the defendant Mr. Moulson, that he should come into terms to give the wife and children some part of the principal of her fortune, and then he will have an immediate benefit from the residue.

Lord Hardwicke ordered it to stand till the first day of causes after the term; and said, perhaps, before that time, the parties, when they see the inclinations of the court, will acquiesce; if they do not, they can have no benefit for a long time, as the interest of her fortune can be applied only to the several demands.

December the 6th, 1742. The cause of *Jewson* versus *Moulson* stood again in the paper, when it appeared, that it was agreed between the parties, that the neat sum, which shall remain after the deduction of costs, shall be divided into equal moietyes; and one moiety thereof was to be paid by *Jewson* to *Moulson*, towards satisfaction of his debt; and the remaining moiety was to be retained by *Jewson*, to be disposed of for the separate use and provision of *Jenny Vobe*, and the children she already hath, or may have, in such manner as the court shall direct; and thereupon Lord Hardwicke ordered and decreed that the agreement be performed, and gave full directions for placing out and securing *Jenny Vobe's* moiety for her separate use, during her life, and after her death, for the payment of it to her children, in equal shares (2).

(1) *Vide* *Pryor v. Hill*, 4 Bro. Cha. Rep. 139.

(2) *Reg. Lib. A.* 1742. 306.

see *Goring*
De Mox v. H. 38

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 Cafe 276.

Webb versus Claverden, October 29, 1742.

A Bill was brought by an heir at law, charging fraud and circumvention in the defendant, in obtaining the will, and insanity in the testatrix.

LORD CHANCELLOR,

This court will not determine a fraud, in procuring a will, without directing a trial at law, which was done accordingly (1).

I shall decree costs against the plaintiff; for where an heir at law will bring a bill to set aside a will for insanity in the testator, when he might have proceeded at law by ejectment, this is such a vexation, that if he fails in setting it aside, he shall pay costs, so far as relates to the controverting of the will.

But where an heir is brought before the court as a defendant, even though he should insist upon the will's being fraudulent, or the testator's being insane, and an issue at law is directed to try the fraud or insanity, yet this court will not give costs against him, though he fails in the attempt of overturning the will, but very often allows the heir his costs (2).

In overturning the will, the court will not give costs against him.

A fraud in procuring a will cannot be determined here, but must be decided by a trial at law. *19.*

Where an heir at law will bring a bill to set aside a will for insanity, instead of an ejectment, he shall pay costs, if he fails.

Where an heir is brought before the court as a defendant, and issue is directed to try the fraud or insanity of the testator, though he fails

(1) *Bennet v. Vade, ante 324.*

(2) *Bidulph v. Bidulph, 2 P. W. 285.*
Humphrey v. Morse, ante 408. *Berney v. Eyre, post, 3 vol. 387.*

Galton versus Hancock, October 29, 1742.

Cafe 277.

THE defendant's late husband being seised in fee of an estate, and having borrowed a sum of money, gave a bond for it, dated *May 12, 1724*, and a mortgage for the same sum on the 13th of *June* following: On the 11th of *December, 1728*, he made his will, and devised the estate in fee which he had thus mortgaged, and also an estate for three lives, to the defendant his wife, and made her sole executrix.

H. being seised in fee of an estate, having borrowed money in 1724, gave a bond for it, and a mortgage on it for a security afterwards: in 1728, by will he devised the mortgaged

estate, and a freehold, for three lives, to his wife, and appointed her sole executrix. The question was, if the personal estate is not sufficient to pay the mortgage, whether the estate descended on the plaintiff should not make up the deficiency, so that the estate decreed to the wife might not be affected whilst there were real assets? Lord Hardwicke held, at the first hearing, the wife was not intitled to such exoneration in a court of equity, but must take the estate with its burden (1).

In 1734, he purchased one moiety of the reversion in fee of the lifehold estate, and the other moiety in 1737, and died soon after, without making any alteration in his will.

The bill was brought by the heir at law, to have the deeds and writings of the lifehold estate, the reversion in fee of which was

T. v. H. & F.
3. Rem. 401
T. v. H. & F.
2. Collyer. 4.

(1) But this decree was reversed, *post. 430.*

purchased

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purchased by the testator after making his will, and for an account of the personal estate.

The plaintiff insists, that the estate descended is not liable to pay the mortgage, and endeavours to throw the burden upon the defendant, to be paid out of the personal assets; and if those should be deficient, out of the estate devised to the defendant.

The defendant insists, that if the personal estate is not sufficient to pay the mortgage, the estate descended upon the plaintiff shall make up the deficiency; and that the estate devised to her shall not be affected while the real assets are sufficient.

Mr. Chute for the defendant, cited *Heron contra Merick*, Salt. 416. *Carter versus Barnardiston*, 1 P. Wms. 505. and *King versus King and Ennis*, 3 P. Wms. 358.

LORD CHANCELLOR,

This cause comes before the court in an odd manner, because the mortgagee is no party, nor has he taken any remedy in law or equity.

The plaintiff however has a clear equity for the deeds and writings of the estate descended, and to have an account of the personal estate of the testator; and I own, I thought the other, at first, as clear a point in favour of the heir; but however, as the defendant, the widow, is a sufferer, contrary to the intention of her husband, for he had no design of purchasing the reversion in fee of the lifehold estate, at the time he made his will, I was willing to hear what could be said on her behalf.

Purchasing the reversion in fee after the will of the lifehold estate, was a revocation *pro tanto*, and descends upon the heir.

But it is so very clear, that the purchasing the reversion after making the will, is a revocation *pro tanto*, that it was very candidly given up at the bar.

From hence it arises that the estate, formerly lifehold, is descended upon the heir, and if descended, let it be by what means it will, whether by being omitted in a will, or revoked, it is the same thing; and will not alter the right between the parties.

This being so, it brings it to the main question, whether, where a real estate is devised with an incumbrance, and another descended upon the heir, the devisee is intitled to have her estate exonerated.

I am of opinion, the devisee is not intitled to such exoneration in a court of equity.

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There is no precedent cited to me where it has been so determined, or where the very point has come directly before the court.

It has been insisted on, that the bond ought to be considered as a distinct debt, and the mortgage only as a collateral security, and therefore are two distinct transactions; and if so, the bond creditor is intitled to come upon the real assets.

I will not say whether this would not make some difference if it was the fact, but it appears to me that both bond and mortgage were to secure the same individual debt, and the bond was only given in the mean time, till the mortgage could be made.

It is likewise insisted on the part of the defendant, that the money borrowed is a debt that charges the heir, for the heir is bound by the bond, and the covenants in the mortgage.

It

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The creditor may proceed against the heir if he pleases, for the law knows no distinction of the personal estate's being to be applied first.

The testator himself has laid a real burden upon the lands devised, and therefore different from the case of a general bond debt.

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Though a husband devises an estate to a wife larger than her dower, she is intitled to both notwithstanding.

1 *Ves.* 230. *Arnold v. Kempstead, Amb.*

467. *Villareal v. Lord Galway, Amb.*

682. 1 Bro. Cha. Rep. 292. S. C.

Pearson v. Pearson, 1 Bro. Cha. Rep.

292. *Baynton v Baynton*, *ibid.* 445.

Tones v. Collier, Amb. 730. Wake v.

Waks. 3 Bro. Cha. Rep. 255.

17. 000, 3 000. 000. 000. 000. 000

Case 278.

Galton versus Hancock, June 11, 1743. Rehearing.

* Mr. Murray.

MR. Solicitor General*, counsel for the defendant devisee.

On the one hand it would be hard for an heir at law out of a small pittance, to pay a debt in favour of a devisee, and on the other hand, where the estate

descended is large, it would be as hard to leave the burthen on the specific devisee, when the almost exhausts the estate: on account of these difficulties Lord Hardwicke adjourned the cause for entries of judgments at law on the statute of fraudulent devises, and for precedents in equity there are specialty debts and mortgaged estates devised besides.

The statute of the 3 & 4 Will. & Mar. ch. 14. of fraudulent devises, shews that the heir and devisee are not put upon the same footing: the devisee cannot be sued alone upon that for the heir must be joined with him: and as I am informed general practice upon judgments on this statute is to inform the heir must make the first satisfaction, which is very painful because there are no direct words in the statute to warrant

The statute has made no manner of alteration but between the creditor and the devisee, and as to heir and devisee the law is the same as before: for if a *bond creditor* exhausts personal assets, the legatee shall stand in his place, and concerning the real assets, for the heir is only intitled after all gifts are satisfied, so that a legatee is preferred to an heir at law: would a legatee of a personal thing be in a better condition a devisee of a real thing? *Vide Hern contra Merick*, before *Harcourt in Canc. Salk. 416.*

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This being the settled rule, that the heir can take nothing of the surplus after all gifts are satisfied; consider the principle which it is founded, (for every rule is founded upon some maxims of law), *namely*, that if a testator can dispose of his whole, *a fortiori* he may dispose of a part.

A bond creditor may certainly sue the heir first if he without coming against the personal assets. *Kingsfon versus Oglethorpe* 19, 1741 (1).

Mr. Chute of the same side said, it is the duty of an heir in the first place to discharge the mortgage, and if there are no personal assets, the heir must prevent the mortgagee from bringing the specific devisee. *Clifton versus Burt, 1 Wms.*

Mr. Attorney General for the plaintiff.

Here is no creditor before the court, and therefore the heir is naked and simply on the proper equity between a devisee and the heir at law.

The devised estate is liable in two capacities.

1st, As it is subject to the mortgage.

2dly, Under the statute of fraudulent devises.

There are many cases where the turn of the scale is given to an heir at law, for the sake of the heir at law: but the gentlemen of the other side have not shewn that equity has taken the turn from the *heres factus*, where the scale is equal, and the turn is upon the *heres natus*.

They consider it in too narrow a view, without reflecting how e will has given it, and the circumstances.

If it appears that it was the testator's intention that the devisee ould take it incumbered, there is an end of the question.

It is impossible that the testator could intend she should take it sincumbered, for he says, "After all my just debts are satisfied, then I give to my wife this estate (1)."

Which shews she was to pay the debts in the first place : afterwards by another independent clause he gives her all other his tates real and personal.

I have proved by the words, that it was the intent of the testator to give it subject to this burden, and the law charges it, as I id before, in a double capacity; and therefore it would be absurd to discharge it contrary to the intention, and contrary to the fect of the law. *Vide the case of Lord Warrington versus Lee, 1. Cas. in Ch. in Lord King's time, 39.*

He that knew he had given her all, subject to his debts, could ot but know that this estate was equally subject, as the law had ade it so.

The devisee is subject here by the particular intention, the cir only by a remote operation of law.

The statute of fraudulent devises is not applicable to the present case, because the statute has no lien upon debts arising from the contract of the parties, but upon general debts only of a testator.

Mr. Solicitor General in his reply said, that clearly before the statute the heir at law was liable in the first place to pay specialty debts, and the devisee was not to pay any part of that debt; and since the statute the law is the same, for the statute enters not into any other case of mischief, but only provides that the creditor shall be paid at all events, and does not in the least disturb any right the devisee might have before against the heir at law.

An heir can never have any contribution against the devisee, because he can have nothing from his ancestor but what is left undisposed of, nor is there any instance of an heir's bringing a bill against the devisee for contribution. He cited *Harbert's case* in 1 Co. 12. b *.

LORD CHANCELLOR,

This case has been more fully argued than it was before; but as counsel on both sides have allowed there is no case exactly in point, for the arguments have been chiefly drawn from analogy to other cases of marshalling assets, I will not be over hasty in determining.

(1) *Post.* 431.

* It was resolved, that in case of a common person the heir of a consur, or he against whom the judgment is given in debt shall be only charged, and shall not have contribution against the terre-tenant in some cases; for if a man be seised of three acres of land, and acknowledges a recognizance or a statute, &c. and enfeoffs A. of one acre, B. of another, and the third descends to the heir; in this case, if execution be sued only against the heir, he shall not have contribution, for he comes to the land without consideration, and the heir sits in the seat of his ancestor. *Harbert's case.*

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Some persons who have sate in this court think it has gone too far in giving one volunteer a remedy by way of circuitry against another.

Though both real and personal estate are liable to debts, yet the real assets are a favoured fund.

To be sure, there is a good deal of weight in the consequences of the other side; and therefore these things deserve the consideration of the court.

For though it seems hard, that where an heir at law has a small pittance, the court should make him pay a debt out of his fund, in favour of a devisee of an estate, which was made subject to this debt, and a devisee likewise of all the residue, both real and personal; yet, on the other hand, suppose an estate of 1000*l.* *per ann.* should descend upon an heir at law, and the testator should have devised another estate, subject to a mortgage which almost exhausts the estate, would it not be as hard to leave the burden upon the specific devisee, where there are real assets sufficient to discharge all the debts?

His Lordship adjourned it to *Michaeltmas* term to look into the entries of judgments at law upon the statute of fraudulent devises; and likewise for precedents of cases in this court, where there are specialty debts, and mortgaged estates devised besides.

Case 279.

Galton versus Hancock, June 25, 1744.

Lord Hardwicke was of opinion, that the wife is intitled to have the mortgage upon the estate devised to her, exonerated out of the real assets descended upon the heir, and reversed the former decree totally as to this point (1).

AFTER Lord Hardwicke had taken a twelvemonth's time to consider of the case, he this day gave judgment in it as follows:

This cause came on last upon a petition of rehearing. See the *State of the case before*, page 424.

At the first hearing, I determined against the defendant.

The principal question is, Whether the defendant is intitled to have the mortgage upon the lands devised to her under the will of her husband, exonerated out of the real assets descended upon the plaintiff, the heir of the testator?

This will depend upon two more particular questions.

First, Whether there are any words in the will to throw this upon the heir at law?

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Secondly, Whether, according to or in consequence of those rules which have been established in equity, the defendant shall prevail to have the mortgage on the estate devised to her, exonerated out of the real assets descended on the plaintiff?

The testator in his will sets out with a desire, that all his debts may be paid in the first place (2), and concludes with a ge-

(1) See the note at the end of this case.

(2) *Ante* 428.

veral

residuary devise to the defendant, whom he makes his executor (1).

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On the part of the plaintiff, it is insisted, that the introductory clause in the will is sufficient to charge the defendant with the insurance upon the estate devised to her, and that she ought to pay it *cum onere*.

But I think it would, with regard to *creditors*, but it is by no means sufficient to fix the *onus* or burden upon the legatee, or to make a variation with regard to the different funds, out of which debts are to be paid, or to transpose the order in which the debts are to be applied for that purpose; for these clauses in the will have received such a construction, merely for the aid and assistance of *creditors*, that they may not lose their just debts.

Where a will sets out with a desire that the debts may be paid in the first place, the wife with respect to creditors, must have taken the estate *cum onere*.

It is not sufficient to fix the burden upon the legatee, so as to make a variation with regard to the different funds, out of which the debts are to be paid; or transpose the order in which they are to be applied for that purpose.

As to part of the real estates devised to the wife, the will is partly revoked, and must be taken as if they had never been devised. I mean those which were only *pur autre vie* at the making of the will, and the inheritance of them purchased in afterwards by the testator.

It would sound extremely harsh in a court of equity, if the court should strain, to charge the devisee with this debt, and by that means lessen even the estate which remains to her under the will, when clearly the intention of the testator was to give her the whole, and totally to disinherit his heir.

To lessen the estate which remains to the wife under the will, where the intention of the testator was totally to disinherit

the heir, would sound harsh in a court of equity.

The second question is a new one, and was never before brought in judgment, or *in specie*.

I shall consider it in two lights.

First, How it would have stood, in case this had been a general debt by bond, or covenant, where the heir is bound, without mortgage to secure it.

Secondly, Whether the mortgage in this case will make any difference.

There are two periods of time which will be material; how it would have been at common law before the statute of fraudulent sales, and how since.

At common law, the devisee was not liable to the demand, because the discent was broke.

The rule of equity before the statute did not differ from the rule at common law, unless there were some particular circumstances in the case.

This court had been often attempting, before the statute, to make a devisee liable to specialty debts, but were not able to do so; and it, which was the occasion of the statute.

(1) *Vide post.* 439. note. *Walker v. Jackson*, *post.* 625.

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Before the statute of fraudulent devises, an heir would have had the aid of the personal estate in case of the real; but if no personal, not intitled to a contribution from the devisee.

The heir, before the statute, would have had the benefit of the personal estate in this court, in case of the real; but if there was no personal, the heir could have had no relief, not so much as a contribution from the devisee.

The heir, before the statute, would have had the benefit of the personal estate in case of the real; but if no personal, not intitled to a contribution from the devisee.

The next question is upon the operation of the statute, abstracted from the mortgage in this case.

The words of the statute of the 3 & 4 W. & M. cap. 14. are these:

“Whereas it is not reasonable or just, that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; and nevertheless it hath so often happened, that where several persons having, by bonds, or other specialties, bound themselves and their heirs, and have afterwards died seised in fee-simple, of and in manors, messuages, lands, &c. or had power, or authority, to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same, or disposed thereof in such manner, as such creditors have lost their said debts: for remedying of which, Be it enacted, &c. That all wills and testaments, limitations, dispositions or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators, and assigns, and every of them) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect, &c.”

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The action under the statute must be brought jointly against the heir and devisee.

By force of this statute, the devisee is made liable at law; and the action must be brought jointly against the heir and devisee.

Sec. 3. “And for the means that such creditors may be enabled to recover their said debts, be it further enacted, That in the cases before mentioned, every such creditor shall and may have and maintain his, her, and their action and actions of debt, upon his, her, and their said bonds and specialties against the heir and heirs at law of such obligor or obligors, and such devisee or devisees jointly, by virtue of this act.”

The next question will be, What judgment is to be entered up in this case?

It has been insisted by the defendant's counsel that there ought to be two distinct judgments: First, That the heir should make satisfaction, and if he has not sufficient assets, then, that the devisee should do it.

But there has been no precedent of any judgment in this action cited in support of this; but then it was said, this was the only reason why the statute directs the heir and devisee to be joined in the

an action, because if the heir had not assets enough, then judgment might be entered against the devisee.

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But this is not conclusive; for I take the provision in the act to be introduced for the benefit of the creditors merely, without regard either to the heir or devisee, for the enabling clause intends the creditor to a new formed writ, and to bring a new action; for otherwise there might have been a collusion between the devisee and heir at law, to play off the will, or not, just as it would suit them best; therefore it was a necessary and wise provision of the act, to join the heir and devisee in the action, to secure the creditor at all events.

The provision in the act was introduced for the benefit of the creditors merely, without any regard either to the heir or devisee, or otherwise by collusion they might have played off the

will, or not, as suited them best.

I directed the solicitors on both sides to search for precedents judgments at common law on this statute, but they have not been able to find any; the reason must be, that the proceedings in this court are more expeditious, for they may have a sale directed, as they have both heir and executor before the court.

The reason why there are no precedents to be found of judgments at common law, is, that the proceedings here are more

expeditious; for as both heir and executor are before the court, the creditors may have a sale.

There are three printed cases on this action, one in *Clift's tries* 243. and another in *Lilly's Entries* 145. which is a better one, the case of *Joseph versus The Duke and Dutchess of Hamilton*, the Exchequer, but no plea or judgment are mentioned.

In the cases on this action in *Clift's* and *Lilly's Entries*, the writ charges the heir in the debt and

the debt; and that the judgment must follow the writ and count is a known rule at law.

The third is in *Lilly's Entries* 529. 7 Ann. but there likewise no plea or judgment, nor any entry of it in the office.

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In all these precedents, the writ charges the heir in the debt and the debt, and so it was in all actions against co-heirs (1). According to the known rules of law, the judgment must follow the writ and count; therefore I conclude the judgment here must likewise be of both. *Vide* 3 Co. 13, 14. where the reason for a judgment against both the heirs is fully set forth.

There is another consideration, which is, that from the nature and form of the judgment itself, there cannot be two distinct judgments. *Vide* *Plowd.* 438. *Davy versus Pepys*, where there is precedent of a judgment at large against co-heirs.

The lands descended are to be delivered to the creditor upon execution, at a certain annual value, until his debt is satisfied. If so, when can the second judgment take place? for you can never say, that this may not be satisfied out of the real assets of the heir, since the judgment is, the creditor to hold *quousq; de eam satisfactum fuerit*.

What is the rule in equity? Why, in case of a debt by specialty, that the personal assets shall be first applied, and if deficient, the heir shall be charged for assets descended.

In equity to satisfy a specialty debt, personal assets must be first applied, and if deficient, the real assets descended.

if deficient, the real

(1) *Vide* *Kinaston v. Clark*, ante 205.

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No case was cited at the bar; but there is one which has some resemblance to it, *Gawler versus Wade*, 1 P. Wms. 99. It is said there by Lord Cowper, it is the act of parliament makes this assents in the devisee's hands, and *that* requiring the heir to be made a defendant, you must follow the remedy therein prescribed; and this bill in equity is as an action at law; but his Lordship said nothing as to a contribution between *the heir and devisee*.

There are two cases where this point has been determined, *Saville versus Saville*, before Lord King and Lord Conwoy's case.

In *Pitt versus Raymond*, the bill was to have satisfaction out of assents descended and devised; Lord Talbot directed, if the personal were not sufficient, an account was to be taken of assents descended, and if that was deficient, then of the devised estate, which shews his opinion as to the order in which the assents were to be marshalled.

I shall add another case, *Pitt versus Raymond*, January 27, 1734, before Lord Talbot: "A new bill there was brought, after a long course of proceeding, to have satisfaction out of assents both descended and devised: his Lordship directed there, that if the personal were not sufficient, then, in the next place, an account was to be taken of assents descended upon the heir at law; and if that should be deficient, then an account was to be taken of the devised estate, which shews his opinion as to the order in which the assents were to be marshalled."

[*435] I take it, that the notion of contribution in the case of *Gawler versus Wade* is not well founded, for it is only started by counsel, but is not supported by any authority.

The statute of fraudulent devises was made merely for the sake of creditors, and not at all in favour of heirs at law.

The enacting clause makes wills void against *such creditors*, but leaves the law as it was before with regard to *heirs*.

In this case, it would be contrary to the plain intention of the testator to make the devisee, the wife, liable to the debt, so that she should, in whole or in part, be defeated of her legacy.

The second question is, Whether there being a mortgage upon this estate devised to the defendant the wife, will make any alteration.

A mortgage is a debt by specialty, and the land is only regarded as a pledge for the money.

It must be admitted that this is a debt by specialty, and that the land is only regarded as a pledge or security for the money in this court (1).

The

(1) *Laney v. Atbol*, post. 444. It is not the covenant to pay or the bond, which occasions this construction, for the land is only considered as a security for the personal debt. *Cope v. Cope*, 2 Salk. 419. *Meynell v. Howard*, Prec. Cha. 61. *King v. King*, 3 P. W. 358. post. 496. 3 vol. 280. On the other hand, where the real estate is originally, or afterwards becomes, primarily liable, the real estate shall be first applied, though a covenant is added, or a bond given; for such covenant or bond is only intended as a colla-

teral security to the land, and cannot alter the fund. *Bagot v. Oughton*, 1 P. W. 347. *Evelyn v. Evelyn*, 2 P. W. 659. *Leman v. Newnham*, 1 Ves. 51. *Shafto v. Shafto*, 2 Cus's P. W. 664. *Tankerville v. Fawcett*, 2 Bro. Cha. Rep. 57. *Ward v. Dudley*, *ibid.* 316. *Billinghurst v. Walker*, *ibid.* 604. See also *Laney v. Atbol*, post. 444. where the court took advantage of a covenant to pay a rent-charge in a marriage settlement in favour of a younger child's portion. But in the case of a mortgage, if a mort-

gage

The mortgagee may take his remedy, indeed, against the executor, or against the heir at his election; but it must likewise be admitted, this election of the mortgagee will not determine which fund ought properly to be charged, nor vary the right as to those funds.

the election of the mortgagee does not vary the right as to the funds, or determine which ought properly to be charged.

This was determined *originally* in favour of the heir, for these reasons, because the heir is in the seat of the ancestor, and, whilst ancient tenures subsisted, was obliged to perform the services.

The first executions were *feri facias*, and *levari facias*, which acted on chattels only, but did not take the land, *vide* 3 Co. 11 b. *William Herbert's* case; and so tender were they anciently of landed estates, that even in the case of the crown, if the goods or chattels of the king's debtor be sufficient, and so can be made to appear to the sheriff, whereupon he may levy the king's debt, he ought not the sheriff to extend the lands and tenements of the debtor, or of his heir, 2 Inst. 18, 19. And Lord Coke, in *Herbert's* case, 12. b. gives the reason why the lands of the king's debtor were liable to the king's execution, because *Theſaurus est pacis vinculum & bellorum nervi*, and therefore the law gave the king full remedy for it.

He might have added another reason why this judgment is in favour of the heir, because otherwise it must have been against the person of the heir, and this is to discharge and exonerate his person.

Here it was that this court stepped in and founded an equity on it, by directing the personal estate to be first applied in favour of an heir, and are not tied down to the rules of law, because this court can bring both heir and executor before them at the same time.

Ornish versus *Mear*, 1 Ch. Caf. 271. is the last case where the court refused to do it in favour of a *heres factus*; this was in the case of my Lord Nottingham indeed, but I believe determined by the Master of the Rolls, or some judge sitting for him; because Lord Nottingham had determined it expressly contrary in a case *re*, which was the first case where a *heres factus* had this determined in his favour, that personal assets should be applied in exoneration. *Vide* 1 Ch. Caf. 223. *Hoyes* against *Hoyes*. But this was in the case of a *heres factus* of the whole real estate.

to release or sell the equity of redemption, and the purchaser covenants with the vendor to pay the mortgage out of the personal estate of the purchaser shall not exonerate the real estate charged. *Pockley v. Pockley*, 1 Vern. 407. *Forrester v. Leigh*, Amb. 171. *St. P. W.* 664. S. C. *Tweddell v.*

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A mortgagee may take his remedy against the executor, or against the heir,

Anciently they were so tender of landed estates, that the sheriff could not, even in cases of the crown, extend the lands of the debtor, if his chattels were sufficient, and so made appear to the sheriff.

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Lord Nottingham first determined in favour of a *heres factus*, that personal assets should be applied in exoneration, but then he was overruled in the case of a *heres factus* of the whole real estate.

Tweddell, 2 Bro. Cha. Rep. 101. 152. *Contra Parsons v. Freeman*, Amb. 115. See also *Cope v. Cope*, 2 Salk. 449. *Larson v. Hudson*, 1 Bro. Cha. Rep. 58. where the debt, being originally personal, has afterwards become a charge upon the real estate.

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Pockley versus Pockley, was the first instance, where it was determined in favour of a devisee of part of the estate only; and Lord *Nottingham's* opinion has been followed ever since.

The first case where it was determined in favour of a devisee of part of the real estate only (1), was the case of *Popley versus Popley*, as it is called in 2 *Ch. Caf.* 84. but in 1 *Vern.* 36. *Pockley versus Pockley*. I need not mention any more cases, for the opinion of this great man (Lord *Nottingham*) hath been followed ever since.

The land is given to the wife, which must mean effectually, for if subject to the mortgage, it is an ineffectual devise.

Where specialty creditors exhaust the personal assets, simple contract creditors stand in their place, and may come upon the real.

By the will in the present case the land is given to the wife the devisee, which must mean effectually; for if given subject to the mortgage, the whole benefit will be drawn from the devise, and rendered ineffectual.

Now if the devisee is entitled to be exonerated; suppose there are simple contract creditors, and a specialty creditor (as the mortgagee in this case is) exhausts the personal assets, have not the simple contract creditors an equity to stand in his place, and to come upon the real assets, and is it not the constant course of this court (2)?

It is agreeable likewise to the reason and equity of the statute against fraudulent devises, which leaves it in full force against the heir at law.

In the last place I think this opinion will coincide intirely with the intention of the testator.

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Here comes in the objection of the most weight on the part of the plaintiff, that this is plainly an estate devised with a *lien* upon it, which shews the testator meant she should take it *cum onere*, that at least it may be said in favour of the plaintiff, there is intention against intention.

But if an inference should be drawn from a testator's mortgaging particular lands, and devising them so mortgaged, that intended these very lands should be liable in the hands of the devisee to this burden, that would equally hold against personal assets being first applied (3); and it is the constant direction of this court, that the mortgaged estate should be considered only a pledge for money, but as to the proper application of the funds for payment of that debt, it is left just as it was before.

It is equal to the creditors to go first against the land devisee and if the court would, in that case, construe it in favour of the devisee against the heir at law, where, by circuitry, the simple contract creditors stand in the place of the specialty, then what reason can be assigned why the devisee should not have the benefit directly against the heir at law.

Clifton versus Burt, 1 *P. Wms.* 678. one died indebted on bond, who by his will had given a legacy of 500 *l.* and devised his freehold lands to *B.* in fee, leaving a personal estate sufficient only to pay the bond; the legatee shall not stand in the place of the bond-creditor to charge the land, in regard the land

(1) *Contra* *Prec. Cha.* 3. (2) *Lansy v. Asbol*, *post.* 446. (3) See note *post.* 437

specifically devised; otherwise if the land had descended to the heir.

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MANCOCK.

This case proves that even general pecuniary legatees are to be preferred to an heir at law, much more a specific devisee of land, and this too is analogous to the rule of law; for every devisee is in nature of a purchaser, and so laid down in *Harbert's Case*, 3 Co. 12. b. that the heir shall not have contribution against a purchaser, although *in rei veritate* the purchaser came to the land without any valuable consideration, for the consideration of purchase is not material in such case.

General pecuniary legatees are to be preferred to an heir at law, a fortiori a specific legatee of land, for it is a rule of law, that every devisee is in nature of a purchaser.

In the search I ordered to be made for precedents, there is but one case which is like it, and that indeed comes very near, *Serle vs St. Eloy*, 2 P. Wms. 386. heard before Sir Joseph Jekyll, January 25, 1727. One devises his lands in D. to A. (his cousin) an infant, at her age of 21, subject to the incumbrances thereon, and the rents during her infancy to be paid to her father, and devises all his other lands to trustees to pay his debts.

The infant the devisee insisted, that the mortgage upon her estate ought to be discharged out of the personal estate, and if that was not sufficient, then out of money arising by sale of the real-estate.

The defendant, the heir at law and reversioner, insisted, that the mortgage was to be paid off out of the rents and profits of the estate devised to the plaintiff whilst he was under age.

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One devises his lands in D. to A. his cousin, an in-

fant at 21, subject to the incumbrances therein, and all his other lands to trustees to pay debts: Sir Joseph Jekyll directed the mortgage on A.'s estate to be paid off out of money arising by sale of the trust-estate, though A. by bill had submitted to discharge it. On appeal to Lord Chancellor King, he affirmed the decree.

Sir Joseph Jekyll was of opinion, that the debt by mortgage on the plaintiff's estate is part of those debts which are to be paid off of the money arising by sale of the trust-estate: and though the infant by her bill had submitted to pay it off, yet he said he would take care of the infant, and directed the bill to be amended. When his cause came on before Lord Chancellor King, on an appeal from the Rolls the 28th of May, 1728, who, after two days sitting affirmed the decree.

I have done with the cases, and shall now take notice of the observations of the counsel on both sides.

The first observation was on the part of the plaintiff.

That this doctrine would extend to level all devisees; for according to this rule, if a testator should have mortgages upon several estates for different sums, and devises those estates to several persons, a devisee of the estate which has the largest mortgage upon it, and least in value, would be intitled to come in with the other devisees for a contribution (1).

That this is not warranted by the case of *Carter versus Barton*, 1 P. Wms. 505.

(1) *Vide post*. 446.

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HANCOCK.

The election of the creditor to come for satisfaction either against the real or personal estate, will not determine what shall ultimately

The other observation was on the part of the defendant, that if she was not intitled to have the estate descended applied to discharge the mortgage, it would have this consequence, that if the mortgagee should bring his action against the heir and recover, which he might certainly do, the heir would then be intitled in this court to have satisfaction against the land devised, as originally subject to the mortgage.

be the fund which shall be charged.

And this is rightly argued; for it is admitted that the election of the creditor will not determine what shall be ultimately the fund which shall be charged.

It would be a most absurd consequence, if the heir at law should in this case draw away from the devisee the benefit which the testator meant to give her by this devise, by making her bear the burden contrary to the testator's intention, and at the same time take beneficially himself, when the testator clearly intended to give away the whole from him.

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It is a much greater reproach to a judge to continue in his error than to retract it.

These are the reasons which induced me to alter my opinion, and I am not ashamed of doing it; for I always thought it a much greater reproach to a judge to continue in his error, than to retract it.

I might at first be influenced by the appearance of hardship in this case on the part of the heir.

The rule in marshalling of assets is of such consequence to the practice of this court, that it ought to countervail any arguments of hardship to particular persons.

But the rule of a court of equity in marshalling of assets is of great consequence to the practice of this court, and ought to countervail any arguments of hardship to particular persons; besides upon mature deliberation, I do not think the case of the heir at law so hard as I did before, because it was not the intention of the testator that the heir should take any part of his estate; and it was a mere accident threw a part upon him, *videlicet*, the ignorance of the testator that it was necessary after purchasing in the fee of these estates *pur autre vie*, to republish his will to make them pass to the defendant the widow.

Upon giving this case all the consideration that I am capable of, I think the former decree ought to be reversed totally as to this point: and accordingly directed an account should be taken of the real assets descended upon the heir, and applied to pay off and exonerate the mortgage upon the estate devised to the defendant (1).

(1) *Reg. Lib. A.* 1743. fol. 657. The rule respecting the order of affecting assets seems to be this: 1st. The personal estate of the mortgagor shall be applied in discharge of the mortgage debt. *Howel v. Price*, 1 P. W. 291. *Prec. Cba.* 477. *Myuell v. Howard*, *Prec. Cba.* 61. *Cope v. Cope*, 2 Salk. 449. *Pockley v. Pockley*, 1 Vern. 35. *King v. King*, 3 P. W. 360. *Portsmouth v. Suffolk*, 1 Ves. 31. *Robinson v. Gee*, *ibid.* 251.

2dly. Ordinarily speaking, estates devised for payment of debts. *Bartholomew v. May*, ante 1 vol. 487. *Tawcote v. Coventry*, 1 Bro. Cba. Rep. 240. *Bateman v. Bateman*, ante 1 vol. 421. note. 3dly. Estates descended, and this too where the mortgaged estates devised are subject to a general charge for payment of debts, as in the present case of *Galton v. Hancock*, *Powis v. Corbet*, *post.* 3 vol. 556. *Davis v. Top*, 1 Bro. Cba. Rep. 524. 2 Bro.

Cha. Rep. 259. S. C. *Wride v. Bro. Cha. Rep.* 261. 4thly. Real specifically devised, subject to, ally charged with the payment *Carter v. Barnardiston*, 1 P. *Davis v. Topp*, 2 Bro. Cha. *p.* 263. *Vide Serle v. St. Eloy*, *p.* 386. But we must observe, personal estate cannot be applied in satisfaction of the real estate mort- gages against legacies (pecuniary or or debts, though it must as an executor or residuary legatee. *Mead*, 1 P. W. 693. *Tipping* *ng*, 1 P. W. 730. *Davis v.* *p.* 2 P. W. 190. *Rider v. Wager*, *p.* 335. *Cutler v. Coxeter*. 2 Vern. *Phillips v. Phillips*, 2 Bro. Cha. Rep. *Male v. Cox*, 3 Bro. Cha. Rep. 322. When a testator gives a legacy, he has an intention to exonerate his person so far as it relates to such par- ticular legacy. So though the personal estate is originally liable, yet the testator exempts the whole of it either by express words or plain manifest intention, as by giving it as a specific legacy. *Adams v. Meyrick*, 1 Eq. Ab. 271. pl. 13. *Bam- field v. W'ynham*, Prec. Cha. 101. *Wain- right v. Bendlowes*, *ibid.* 451. Amb. 581. S. C. *Stapleton v. Colville*, Ca. temp. Talb. 202. *Phippis v. Annisley*, ante 58. *Bicknel v. Page*, ante 79. *Walker v. Jackson*, post. 624. *Anteater v. Mayer* 1 Bro. Cha. Rep. 454. *Webb v. Jones* 2 Bro. Cha. Rep. 60. But the mere charging an estate with, or creating a term for payment of debts, will not alone create such an intention of exempting the personal estate. *Dolman v. Smith*, Prec. Cha. 456. *French v. Chichester*, 2 Vern. 568. *Stapleton v. Colville*, Ca. temp. Talb. 208. *Hastwood v. Pope*, 3 P. W. 325. *Fereys v. Robertson*, Runb. 302. *Brudenel v. Boughton*, ante 273. *Walker v. Jackson*, post. 625. *Bridgman v. Dove*, post. 3 vol. 302. *Lord Inchiquin v. O'Brian*, 1 Wilf. 82. Amb. 33. S. C. 1 Bro. Cha. Rep. 458. S. C. *Samwell v. Wake*, 1 Bro. Cha. 144.

erfus Coleman, November 3, 1742, upon *Exceptions at Lin.* Case 280. *coln's-in hall.*

I E plaintiff brought a bill against the defendant, as ad- ministratrix of her husband, for an account of his assets.

The court decreed an account against her, and reserved all directions till the cause came back upon the Master's re- port interest was not reserved.

The court had decreed an ac- count against the defendant, of the assets of her hus-

band; she took all his goods and stock in trade, and carried on the business: the Master reported 1400*l.* due to the plaintiff's upon a balance of accounts, who insisted that for that sum. Lord Hardwicke held, that this being a demand on simple contract, and the ad- ministratrix not having yet sold the goods, her only fund for raising money, she shall not be charged with in- terest 1400*l.*

defendant, after the death of her husband, took all his goods and stock in trade, according to the appraised value, and carried on the same business, but has not sold off all the

bill was brought in 1740, within six months after the husband's death; the defendant put in her answer immediately; the cause was heard in 1741, in less than two years from the date of the bill, so that she was guilty of no delay.

Master reports 1400*l.* due to the plaintiffs upon a balance of accounts. [440]

She came on now before Lord Chancellor for further directions; the plaintiff's counsel insisted on interest for the sum of 1400*l.* reported due by the Master to the plaintiff.

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The

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COLEMAN.

The defendant objected, first, that no interest was reserved by the decree, and therefore, by the course of the court, it could not now be made a question for judgment; and, secondly, had been reserved, yet the defendant was not chargeable with interest in this case.

LORD CHANCELLOR,

Though there be no particular reservation of interest by a decree, yet there is a discretionary power in this court to allow it, upon special circumstances (1).

I am of opinion, that generally no interest can be allowed, if it is not ordered or reserved by the decree; but notwithstanding there is no particular reservation of interest by a decree there is a discretionary power in this court to allow interest in special circumstances; as where the demand in its nature is interest, as a bond, &c. or where it appears that the assignor has made interest of his intestate's effects, while the cause has been depending.

But nothing of that kind appears in this case; and the plaintiff's demand being only upon simple contract, and the defendant having no other means to raise the money but by sale of the intestate's goods, which are not yet sold, there is no pretence for charging her with interest upon the 1400 l.

(1) *Goodyere v. Lake*, Amb. 584.

Case 281.

Stonebrower versus Thompson, November 8, 1742.

G. H. in 1693, confessed a judgment, but it was not to take place till after the death of a woman who lived till 1726; the estate subject to this judgment descended to J. H. who mortgaged it to the defendant; and in 1721 became a bankrupt, five years before the judgment was to take place. Lord Hardwicke the representative of the judgment creditor, and not the assignee under the commission, is intitled to redeem the mortgage, and to have the estate of G. H. exonerated out of J. H.'s estate, if sufficient.

GEORGE Hitchcock, in 1693, confessed a judgment at the same time there was a defeasance executed, by which the judgment was not to take place till after the death of a woman who did not die till 1726 (1); the estate, subject to this judgment, descended from the ancestor to the heir John Hitchcock who mortgages it to the defendant Thompson, and likewise another estate of his own: the mortgagee had no notice of the judgment at the time: the heir becomes a bankrupt in five years before the woman died, on whose death the judgment was to take place: the defendant is appointed assignee.

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The representative of the judgment creditor has brought a bill to redeem the mortgage, upon payment of principal, interest, and costs.

The question is, as there was no actual elegit taken out by the judgment creditor before the commission of bankruptcy: Whether the assignee under the commission shall redeem the mortgage, or the judgment creditor?

Mr. Murray, for the plaintiff, cited *Sir William H. case*, Co. 3. Rep. 12. *Sir William Jones* 88. *Dyer* 81. to show that the heir is chargeable only as tenant, and therefore

(1) And then it was to take place upon a contingency, which however happened.

son who claims under the judgment, is not a creditor of the bankrupt (1).

LORD CHANCELLOR,

The judgment creditor is intitled to redeem the whole, for it is intire, and to have the estate of *George Hitchcock* exonerated out of the estate of *John Hitchcock*, if *John's* is sufficient. As to the point which has been laboured, in order to make a person come in as a creditor under the commission of bankruptcy, there is nothing in it.

If it had been merely a bond creditor from the ancestor, there might have been some colour to insist upon this under the statute fraudulent devises, because that act makes it a debt against the ancestor himself (2), as well as the ancestor.

But it is intirely different here, as this is a judgment which is a lien upon the land (3), *a fortiori*, a lien upon the lands in the hands of the assignee under the commission, who stands only in the place of the bankrupt.

As it is the best way, I shall decree the estate to be sold, and the plaintiff to be paid in the first place (4).

1) Part of the premises comprized in the mortgage did not descend from *George Hitchcock*.

2) *Stileman v. Alldown*, post. 609.

3) *Brace v. Marlborough*, 2 P. IV.

4) *Bunb.* 347. Secus as to terms of mortgages and other chattel interests. *Fleet-wood's case*, 8 Co. 171. a. *Shirley v. ...*, post. 3 vol. 200.

4) His Lordship gave directions (comptroller's counsel consenting) for sale

of the whole of the premises comprized in the mortgage: and out of the monies arising by such sale, the mortgagee to be paid his principal, interest, and costs, in the first place, and out of the residue of such monies so much was to be applied in payment of the plaintiff's judgment as should not exceed the value of the estate of *George Hitchcock*, Reg. Lib. B. 1742. fol. 140.

STONEWELL
v. THOMPSON.

Meate
10 Marlboro
3 Mylch.
407.

Sheppard versus Gibbons, et al, November 13, 1742.

Case 282.

THE question in this cause arose on the words of *John Bromwich's* will, who being seized in fee of a freehold estate at *Wry Barr* and *Great Barr*, in *Staffordshire*, June 9, 1711, made his will, "and thereby devised to *Thomas Lacy* and *Joseph Gibbons*, their heirs and assigns, the lands afore mentioned, in trust, that the said *Lacy* and *Gibbons*, and the survivor, and his heirs and assigns, should permit his three sisters *Mary Rudge*, *Elizabeth Sayer*, and *Ann Pace*, and their assigns, to hold and enjoy the said premises, and to receive the rents thereof to their sole and separate use, as they should appoint, notwithstanding their coverture, to the intent that the said three husbands might have nothing to do with the said premises, or the rents thereof; and as his said sisters should severally die, he gave the premises to their several heirs, with a proviso for the trustees to demise and let the said premises during his sisters' lives, but to permit them and their heirs to receive the rents thereof; that in regard his personal estate would not be sufficient to pay his debts, legacies, and funeral charges, therefore the testator

Lord Hardwicke held, that the construction in this will of the words, as his sisters severally die, is, that the sisters should take as tenants in common, and not as jointenants.

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Turning
v. Powell
2 Collyer. 262

"directed

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“ directed that *Thomas Lacy* and *Joseph Gibbons*, and the survivor
“ of them, and the heirs of such survivor, should sell and dis-
“ pose of such part of his said messuage, lands, and tenements,
“ and of the freehold and inheritance thereof, by sale or mort-
“ gage, or by sale of any timber growing thereon, as they should
“ see occasion, and with the money thereby arising, to satisfy
“ all and so much of his debts, &c. as his personal estate should
“ not amount to pay.”

He appoints his three sisters executors, and soon after died, leaving them together with the plaintiff, the son of *Eleanor Sheppard*, another of the testator's sisters, who died in his life-time, his co-heirs.

On the 23d of *January* 1713, *Mary Rudge* died, leaving issue the defendant *Rudge*, her only daughter and heir; *Ann Pace* is also since dead, and the defendant is her son and heir.

Elizabeth, the wife of the defendant *Sayer*, in her life-time, joined with her husband in levying a fine, and the deed to lead the uses has vested a trust-estate in fee in the husband, of her third part: she died without issue on the 7th of *August* 1737, leaving the defendants *Rudge* and *Pace*, and the plaintiff, as being the issue of her three sisters, her co-heirs at law.

The plaintiff has brought his bill against *Gibbons*, the heir of the surviving trustee, to be let into possession of a third of the testator's estate.

The first question was, Whether the devise to *Lacy* and *Gibbons*, and their heirs, to hold to them and their heirs, is a devise of a bare trust to them in fee of the whole inheritance in the estate, or whether the use of the whole inheritance executed in the three sisters.

Or whether, secondly, the devise to the trustees gave them a legal estate only for the lives of the three sisters, upon the trust in the will, so that the remainder, limited to their respective heirs must vest in them as purchasers.

[443] Mr. *Harvey*, for the plaintiff, in order to shew that the intention of the testator shall prevail over the law, cited *Boraston's* case, 3 Co. 19. a. *Backhouse* versus *Wells* (1), *Hill*. 12 Ann B. B. before Lord Chief Justice *Parker*, &c. *King* versus *Melling*, 1 Vent. 225.

And to shew that the words heir of the body, and heirs male have been construed words of purchase, or words of limitation as they support the intention of the testator; he cited *Papill* versus *Voyce*, 2 P. W. 471. *Lisle* versus *Gray*, 2 Jones 214. Lev. 223.

And that the doctrine in *Skelly's* case, 1 Coke, though it has prevailed in deeds, yet has not been extended to wills.

LORD CHANCELLOR,

This case is so very plain, that there is no occasion for hearing the defendant's counsel.

If this is a contingent limitation for the sisters to take by purchase, they must either do it, on its being a contingent

(1) 1 Eq. Ab. 184. pl. 27.

itation of the trust, or a contingent limitation of the legal estate. SHEPPARD V. GIBBONS.

It is true, the whole inheritance may be vested in trustees, and yet afterwards there may be a springing use which shall defeat the first limitation of the legal estate, so that they can never unite to make one estate of inheritance, but shall continue separate.

But consider this case; the first limitation was to trustees and their heirs, and if you should make this construction, that the trustees had only a contingent legal estate, defeasible upon the death of either of the sisters, then what would become of the subsequent trust in the same trustees, for the payment of debts.

Therefore the whole legal estate must be considered as originally in the trustees (1).

Then the question will be, What kind of trust this is?

There is no colour in the world to say that the testator created his trust to put the inheritance out of the sisters, but his meaning was only to prevent the husbands from intermeddling.

It is true, the word heirs may be made words of purchase, but then they must be very particular, *and as they shall severally die, I give the premises to their several heirs*, which are the words here, and have never been held to make the heirs purchasers.

Suppose a man should devise to A. for life, and to the heirs of his body, would not the court unite the two estates, so as to make the first taker tenant in tail? [444]

A devise to A. for life, and to the heirs of his

body, unites the two estates so, as to make the first taker tenant in tail (2).

Then the plain meaning of the words, *as they severally die* (3), &c. is that the sisters should take as tenants in common, and not as jointenants.

Upon the whole, a clearer case could not come before the court; and therefore I must affirm the Master of the Rolls's decree (4).

(1) *Roberts v. Dixwell*, ante 1 vol. 607. *Broughton v. Langley*, 2 Salk. 679. See *Bagshaw v. Spencer*, post. 577, 578. *Fearne* 104. ed. 4th.

(2) *Vide Coulson v. Coulson*, ante 246. (3) *Vide Heathe v. Heathe*, ante 123.

King v. Burchell, cited 2 Burr. 1103. (4) The bill had been dismissed by the *Morris v. Le Gay*, *ibid.* 1102. *Goodright v. Pullyn*, 2 Ld. Raym. 1437. Master of the Rolls, *Reg. Lib. B.* 1742. fol. 20.

Case 283. *Miss Lanoy versus The Duke and Dutchess of Athol*, November 13, 1742 (1).

LORD CHANCELLOR,

There being a borrowing and a lending in the case of a mortgage, the real estate is considered only as a pledge, and the personal liable in the first place; but this rule has never been carried so far, as to extend it to a provision in a settlement.

THIS cause comes after a great length of time, but that is no objection as the plaintiff was an infant, and is only now just of age.

Two

(1) This case, from the Register's book, is thus: Mr. *Lanoy*, upon his marriage with *Jane Frederick* (now the Dutchess of *Athol*, and mother of the plaintiff) by indentures dated the 28th and 29th of *January*, 1718, settled his estates in *Hammer-smith* and *Fulham* to the use of himself for life, and after his decease, to the intent that *Jane* might have a rent charge of 500*l. per annum* in lieu of dower: remainder to his heirs male; remainder to Mr. *Lanoy* in fee. In this settlement Mr. *Lanoy* covenants, that if *Jane* should survive him, *his heirs, executors, or administrators*, would pay her the said 500*l. per annum*. After the marriage, Mr. *Lanoy* surrendered some copyhold estates to the use of his will; and in 1719 bequeaths the residue and remainder of all and singular his estate, both real and personal, wholly and solely (after paying his just debts) unto the defendant *Jane*, and appointed her sole executrix: but in case he should leave any male issue by the said *Jane*, then he gave to such issue his estate at *Hammer-smith*, freehold, copyhold, and leasehold; he paying to his mother 500*l. per annum*: but if he left only a daughter, then his wife should pay her, when she married (if it was with her mother's consent) 6000*l.* By indenture dated the 21st *October*, 1723, reciting, that Mr. *Lanoy*, in right of his wife, was intitled, by her father's death, to a large sum of money, he, in consideration thereof, covenanted to levy a fine of the estates comprized in the indentures of 28th and 29th *January*, 1718, to the use of himself for life, and after his decease, to secure the said *Jane* the said rent charge of 500*l.* for life, in bar of dower; remainder to trustees for a term; remain-

der to first and other sons in tail male; remainder to the heirs of the body of Mr. *Lanoy*; remainder to himself in fee. The trusts of the term were to raise 6000*l.* for daughters' portions, if no issue male, and maintenance at the rate of 80*l. per annum*. Mr. *Lanoy* died, leaving plaintiff, his daughter and only child. *Jane* married the Duke of *Athol*. Upon the hearing of this cause his Lordship declared, that the settlement in 1723 was a revocation of the will as to the freehold and leasehold estates comprized in that settlement, and as to the legacy of 6000*l.* bequeathed to the plaintiff: but as to all freehold and copyhold lands not comprized in the said settlement, the same belonged to *Jane* and her heirs, by virtue of the said will: and his Lordship decreed, that the defendant *Jane* should come to an account for the rents and profits of the premises comprized in the settlement of 1723, since the testator's death: and the said defendant was, in the first place, out of the rents and profits, to deduct and retain to her own use 500*l. per annum*: and in the next place she was to deduct 293*l.* for fines and charges of renewing the leasehold estate; and also to retain 80*l. per annum* for the maintenance of the plaintiff: and the said defendant *Jane* was to account annually for the said rents and profits, and to make the like deductions. The plaintiff petitioned for a re hearing, shewing that accounts had been taken by the Master since the decree, and he had made his report; whereby it was stated, that the rents and profits had been yearly deficient to answer the said 500*l. per annum*, the said 80*l. per annum*, and the fines: so that there was a balance due to the defendant.

Two things which have been mentioned, may be laid out of case,

First, That it appears there was some surprise upon the court.
Secondly, That things were not rightly stated.

I have read over the copy of the decree, and it does appear to me, that the material things were before the court.

And the same points were insisted on then as are now: and therefore I cannot impute any improper management to the cause, in order to prejudice the infant.

But, however, if the court should have erred in their judgment, the plaintiff is intitled to have it set right.

The first objection to the decree is, that there is no direction for the payment of the Dutcheffs of *Atbol's* arrears of 500 *l.* *ann.* nor the arrears of 80 *l.* *per ann.* charged on the real estate, for the plaintiff's maintenance during her minority.

It appears that the real estate falls very short of answering all the charges upon it; and therefore the plaintiff's counsel insist, she is intitled to have these deficiencies turned upon the personal and copyhold estates belonging to the late Mr. *Lanoy* her father; cause there is a covenant in the marriage settlement, that in case his wife should survive her husband, then his heirs, executors, &c. should pay the 500 *l.* *per ann.* to his wife, clear of every thing except the land-tax.

But though there is this covenant, it is truly said by the defendant's counsel, that the personal assets are not the original and charged (1), and in that respect differs from a mortgage, or any other incumbrance, for there being a borrowing and lending in the case of a mortgage, the real estate is considered as a pledge (2); and the personal estate, which is the na-

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The Duke and
Dutcheffs of
ATBOL.

Graves v. Hester
6 Sim. 120.

Barnes v. Rance
14 C. Cl. 401.

Bugden v. Bigmol
24 H. L. Cl. 137.

Bulwer v. Ashley
1 Phillips 122.

Arvyle v. Wade
1 Lloyd & Groot
252.

[445]

Hickling v. B.
3 Mad. 61.

endants of 3937 *l.* which they were to stain out of the next rents and profits; and in consequence of this, if the defendant *Jane* was to live a few years longer, and such arrears were considered as a charge upon the freehold and leasehold estates, the plaintiff would be deprived of her portion of 6000 *l.* and also of her inheritance. The cause was heard, when his Lordship directed an account of what was due for the said portion of 6000 *l.* and also for the said ann. charge of 500 *l.* *per annum*: and his Lordship directed the estates to be sold, and with the consent of defendants ordered a value to be set on the said 6000 *l.* *per annum*: and that the monies arising by such sale or sales should, in the first place, be applied to pay the due of the said 500 *l.* *per annum*, and in the next place, the arrears of maintenance, and then the said portion of 6000 *l.* and interest. "And in case the

" money arising by such sale shall not
" be sufficient to answer the said 6000 *l.*
" and interest, then the plaintiff is to stand
" in the place of the defendant, the Dutcheffs
" of *Atbol* to have the benefit of the cove-
" nant contained in the settlement of 29th
" January 1718 for payment of the said
" annuity, and by virtue thereof to re-
" ceive a satisfaction for the deficiency
" of her said portion of 6000 *l.* and in-
" terest out of the personal estate of her
" father the said *James Lanoy*:" and if
the personal estate should prove deficient,
then out of the freehold and copyhold
estate devised by the will for payment of
debts. Reg. Lib. B. 1742. fol. 280.

(1) *Coventry v. Coventry*, 2 P. W. 222.
Edwards v. Freeman, 2 P. W. 436.
Eyely v. Eyelyn, 2 P. W. 664. *Bur-*
goigne v. Fox, ante 1 vol. 575. See
Galton v. Hancock, ante 435. 439. and
notes.

(2) *Ante* 435. note 1.

tural

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tural fund, is liable in the firſt place (1); but this rule has never been carried ſo far as to extend it to a proviſion upon a ſettlement.

Then conſider this upon the firſt ſettlement, which was in conſideration of marriage, and is a good one, though the wife brought no fortune at the time (2); Mr. Lanoſy creates a charge of 500 *l. per ann.* upon his real eſtate, as a jointure for his wife, and ſubject thereto, to the heirs males of his body, and in default of ſuch iſſue, to his own right heirs.

Suppoſe a much ſtronger caſe than the preſent; that there had been a ſon, who would have taken *per formam doni* under the ſettlement; and yet would he have had the real eſtate diſincumbered out of the perſonal? There is no pretence to ſay he would; there never was, nor ever will be ſuch a decree; *a fortiori* the plaintiff is not intitled to it under the firſt ſettlement, as the takes only as heir at law.

Conſider it next under the ſecond ſettlement; the huſband and wife levy a fine, and make a new ſettlement, the limitations of which were, to himſelf for life, and to his wife for life, then a term of 200 years to raiſe a portion of 6000 *l.* for daughters, whether any ſons, or not, and ſubject thereto, to the heirs of the body of the huſband.

Under this ſettlement, what ground has the plaintiff to have the real eſtate diſincumbered out of the perſonal?

She does not, in the firſt place, take as a purchaſer, for it is a ſettlement after marriage: there is no limitation to the firſt, and every other ſon, no limitation to the heirs of their two bodies, but a general limitation to the heirs of his body.

Now, by virtue of this ſettlement, if Mr. Lanoſy had ſurvived his wife, and married again, it would have gone to the eldeſt ſon of his ſecond wife, and not to the plaintiff.

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But ſtill I am of opinion, there is an equity for the plaintiff, and that is in reſpect of the 6000 *l.* portion.

By the firſt ſettlement, there is no proviſion by way of portion at all; then afterwards comes this great acceſſion of fortune to the wife, from her father Mr. Frederick.

Suppoſe Mr. Lanoſy was intitled to this addition in his own right, or in the right of the wife only, he was either way juſtified in making the ſecond ſettlement (3).

Now the plaintiff is a daughter, and a child, and in this court conſidered in the nature of a creditor for the portion.

If that be ſo, What will be the effect of it in equity?

By the Maſter's ſtate of the account, there are great arrears of the 500 *l. per ann.* jointure upon the wife, and likewise of the 80 *l. per ann.* maintenance for the plaintiff, almoſt a deficiency of 4000 *l.* which muſt run on as a burden upon the inheritance,

(1) *Ante* 439. note 1.

(2) *Ex parte Maſh*, *ante* 1 vol. 158.
Brown v. Jones, *ante* 1 vol. 190.

(3) *Vide Colville v. Parker*, *Cro. Jac.*
158. *Jones v. Maſh*, *Ca. temp. Talb.*

64. *Ward v. Shallet*, 2 *Vef.* 16. *Hyl-*

ton v. Biſcoe, *ibid.* 308. *Brown v. Jones*,
ante 1 vol. 190. *Wheeler v. Caryl*, *Ambl.*

121. *Stileman v. Abdown*, *poſt.* 477-
479.

has been truly said, it must exhaust the inheritance, if the heirs of *Athol* should live to be very old, which, in the course of nature, they may do.

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Dutchess has two funds, real and personal assets, to answer demands, the plaintiff has only one.

not then the constant equity of this court that if a creditor has no funds, he shall take his satisfaction out of that fund upon which another creditor has no lien (1).

If a creditor has two funds, he shall take his satisfaction out of

that upon which another creditor has no lien.

pose a person, who has two real estates, mortgages both to A. and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to release the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even if the estates descended to two different persons (2).

A person who has two estates, mortgages both to A. and afterwards, one of them only to B. the first shall take his satisfaction out of that which is not in mortgage to the second mortgagee, though the estates descend to two different persons.

I therefore I am of opinion, that so far as will secure the plaintiff her 6000*l.* fortune, she ought to be considered as a creditor, and intitled to turn the *Dutchess* upon the copyhold and real estates.

So far as will secure the plaintiff her 6000*l.* the court considered her as a creditor, and intitled to turn her mother on the copyhold and personal estates.

intitled to turn her mother on the copyhold and

there is a very strong case of a portion, in the case of *Reeve v. Reeve*, 1 *Vern.* 219. and 2 *Ventr.* 363. where the court decided upon the same foundation as I do now*.

The next consideration is as to the 80*l.* yearly maintenance.

There is no ground, as it stands only upon the settlement, to say it can be a charge upon the personal estate.

When it may be likewise put upon the same foot as the portion, as to compelling the mother to maintain her daughter out of her own estate, it will be going too far (3), and therefore lay that out of the case.

Vide Clifton v. Burt, 1 *Cox's P.*

(2) *Vide ante* 438.

19. note 1. *Galton v. Hancock*,

(3) *Billingstey v. Critchett*, 1 *Bro. Ch.*

16. 438. *Martin v. Martin*, 1 *Ves.*

Rep. 268. *Tubb. v. Harrison*, 4 *Durn. and East* 118.

charges lands in *D.* with a portion for a daughter by a first venturer, and then settles part of these lands for the jointure of a second wife, who has no charge.

When the portion would take place of the jointure, by will, gives other lands herof.

When, by combination with the heir, refuses to accept the devise. Decreed, that she should hold the lands given under the will to the wife, till her portion

Reeve versus Reeve, 1 *Vern.* 219.

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The court, in
the caſe of an

elder brother, will direct the Maſter to make a larger proviſion for him, that he may be able, as the head of the family, to maintain the younger.

The utmoſt this court does, is in the caſe of an elder brother where it directs the Maſter to make a larger proviſion for him, that he may be enabled to maintain his younger brothers, as he is the head of the family, and the houſekeeper (1).

I think theſe are all the points, except the queſtion, which relates to the ſtock, and annuities ſtanding in the joint names of the huſband and wife at Mr. Lanoſ's death.

Mr. Lanoſ married his lady at a time ſhe had no portion, and made a ſettlement upon her in conſideration of marriage only.

By the determination of the queſtion in *Frederick verſus Frederick*, 1 P. W. 710. the Dutcheſs of Athol became intitled to a fifth of a fifth of the father's cuſtomary eſtate, ſo that, by virtue of the decree, ſhe was let into a very great fortune, which was directed to be paid to her only, but the ſtock, notwithſtanding, was transferred to the huſband and wife; if nothing more had been done, the huſband to be ſure might have diſpoſed of it as he pleaſed; but if he made no alteration, ſhe would certainly have been intitled to it on the foot of the tranſfer.

But it does not reſt there, for the ſecond ſettlement was made afterwards, reciting, that Mr. Lanoſ, in the right of his wife, being become intitled to exchequer annuities, and money to the value of 1600 l. the limitations under it are in ſtrict tail, and proviſions for daughters.

Mr. Lanoſ dies in the life of the wife, leaving the ſtocks and annuities unaltered, which in law is conſidered as ſurviving to the wife.

But, by the plaintiff's counſel, it is inſiſted, that though is point of law it ſurvives, yet by the equity of this court, the huſband, in conſideration of the ſecond ſettlement, is become a purchaſer (2).

But, upon looking into the caſes, I own I cannot carry it ſo far, as to take it from the mother, and give it to the daughter, as the perſonal eſtate of the father.

The wife's portion has been decreed to the huſband, though he has not made a ſettlement adequate to it, where the ſettlement was before marriage;

otherwise on a voluntary ſettlement after marriage.

I believe, where the ſettlement made by a huſband has not been adequate to the wife's fortune, this court has, notwithſtanding, decreed that he ſhall have her portion: but then all theſe caſes are upon ſettlements before marriage, and I cannot find it ſo determined where it is a voluntary ſettlement after marriage.

(1) *Petrie v. Petrie*, poſt. 3 vol. 511. *Burnet v. Burnet*, 1 Bro. Cha. Rep. 179.

(2) *Blois v. Hereford*, 2 Vern. 501. *Cleland v. Cleland*, Prec. Cha. 63. *Meredith v. Wynn*, ibid. 312. *Packer v. Wyndham*, ibid. 412. *Carteret v. Paſchall*,

3 P. W. 199. note D. *Adams v. Cole*, Ca. temp. Talb. 168. *Ganforth v. Bradley*, 2 Vef. 675. Vide *Liſter v. Liſter*, 2 Vern. 68. *Bond v. Simmonds*, poſt. 3 vol. 20. *Salway v. Salway*, Amb. 69.

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then apply those authorities to the present case.

The second settlement was upon a very great accession of fortune to the wife, after she had been married some time, but is means adequate to the addition; for there is nothing new in this settlement, except the provision for the daughter's share; for the jointure to the wife is the same, and is no more upon the husband's estate than before.

Now, the provision for the daughter has nothing to do with the general rule of a settlement equivalent to the fortune of the father with the mother.

What I go upon is this, that here was no contract on the part of the wife, she was incapable of contracting herself, neither had father or guardian to contract for her.

There had been any application to this court, with regard to the second settlement in Mr. Lano's life-time, they would have directed the Master to see if the husband had made an adequate settlement; and the court would have asked the wife, who was present, by way of analogy to passing the fine, whether she considered her fortune should be settled in this manner, and then she would have been bound by such consent and agreement (1). It is not to say that she is bound, without the intervention of this court, or without her own agreement, is carrying it too far.

The case of *Adams v. Cole*, before Lord Talbot, is indeed a strong one; but then it was a settlement made after, upon an agreement before marriage; and Lord Talbot laid the stress altogether upon it's being the express agreement of the parties; and for that reason decreed for the representative of the husband against the representative of the wife.

But in the present case the wife was incapable of contracting, under coverture: and what makes it a great deal stronger, is that it may be collected from the transactions themselves, that it was the intention of the parties the Dutchess should have money: for Mr. Lano having the power over the property of the wife, was a very sufficient consideration for what he has done for the wife on the second settlement. And yet he has sufficient to stand unaltered all his life-time, and even after his death, then why should the court take it contrary to the intention of the testator from the mother, and give it to the daughter?

(1) *Vide Willats v. Gay*, ante 67. *Hyde*, 2 Bro. Cha. Rep. 663. *Dimmock v. Hughes*, post 454. *Milner v. Atkinson*, 3 Bro. Cha. Rep. 195. *Vide* 1, 2 P. W. 642. *Parsons v. Dunne*, etiam, *Frazer v. Baillie*, 1 Bro. Cha. Rep. 518. *Ex parte Higbam*, 2 Ves. Anon. 2 Ves. 671. *Minet v.*

The husband upon marriage (in consideration of his wife's fortune computed at 1000*l.*) agrees to yearly payments to her separate use, that she may dispose of 200*l.* by will in her life-time; that if she survive he is to leave her 200*l.* apparel, plate, &c. If her fortune was a bond of 200*l.* The husband dies, having made his will, and appoints residuary legatee, but had not recovered this 200*l.* due on the bond; then the wife dies: this bond shall go to the representative of the husband, he being a purchaser of it by the settlement on her. *Adams v. Cole*, *Caf. in Eq. in the time of Lord Talbot*, 168.

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Therefore I muſt decree the Maſter to ſee what is due for the plaintiff's arrears of maintenance, and if mortgaging or ſelling the 200 years term ſhall not be ſufficient to ſatisfy the arrears and the 600*l.* then the Maſter to take an account of the perſonal and copyhold eſtates of Mr. Lanoſy, that the plaintiff may be ſatisfied there, if the real eſtate ſhould not be ſufficient.

Caſe 284.

Clayton verſus Cookes, November 15, 1742.

James Clayton ſon of Sir Clayton Clayton Bart.

9. 2. 13. 469

A Bill brought by a lord of a manor againſt copyholders, to compel them to come, and be admitted tenants.

LORD CHANCELLOR,

After proclamations made, and ſo many court days, if the copyholders do not come in, the lord may ſeize upon their lands.

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A lord of a manor cannot bring a bill of this kind, but has his remedy at law by making proclamations ſo many court days, and if the copyholders do not come in, he may ſeize upon their lands, or if they ſhould be infants, a new act of parliament, 9 *Geo. 1. c. 29. ſec. 1.* has chalked out a method how he ſhall proceed.

If indeed there had been any conſuſion ariſing from copyhold lands being blended together, the lord might have brought a bill of diſcovery to aſcertain the lands.

But as it is not pretended in this caſe that there is any conſuſion of lands, the bill muſt be diſmiſſed with coſts.

Caſe 285.

Knotsford verſus Gardiner, November 17, 1742.

John v. Blackbourn
M. C. 1742. 5. 11

THE queſtion in this cauſe aroſe upon the following will :

Y. C. ſeiſed of ſeveral freehold lands, and poſſeſſed of ſeveral leaſehold lands, deviſed to his wife for life all his eſtate in London, and after her death, he bequeathed the aforeſaid eſtates to his daughter *A. C.* and her heirs, and to his wife gave all his goods, cat- tels, and chat- tels, and made her ſole executrix: ſhe married again, and had the plaintiff by her ſecond huſband, who inſiſted that by the deviſe to his mother of the reſidue, the leaſehold lands paſſed. *Lord Hardwicke thinking it very material, whether all the freehold lands were comprized in the teſtator's marriage ſettlement, directed a trial at law to aſcertain this fact.*

John Colcheſter ſeiſed in ſec of ſeveral freehold lands, and poſſeſſed of ſeveral leaſehold lands in the ſame pariſh, deviſed in the following manner: " I give, deviſe and bequeath unto *Martha* my wife for life, all my eſtates in *Longden, &c.* and after her deceaſe, I give, deviſe and bequeath the aforeſaid eſtates to my daughter *Ann Colcheſter* and her heirs for ever. " *Item*, I give and bequeath unto my wife all my goods, cat- tels and chattels, and all other things not before bequeathed," and made his wife ſole executrix.

She ſome time after her huſband's death married again, and had the plaintiff by the ſecond huſband, who inſiſts that by the deviſe to the wife of the reſidue, the leaſehold lands paſſed to her, and claims as the executor of his mother, who was the executrix of *John Colcheſter* the teſtator; for he ſays, that as there are freehold and leaſehold both, that nothing but the freehold paſſed to the defendant, the daughter of the teſtator, being ſufficient to anſwer the word *eſtates* in the will.

Mr.

Mr. *Murray* for the plaintiff cited the case of *Rose v. Bartlet*, *KNOTSFORD v. GARDINER*, 1 Car. 293. pl. 3. Hil. 8 Car. B. R. to shew that if words used applicable to both, it shall by way of eminence pass only simple lands.

That the word *estates* is plainly local, and does not mean the estate in the estate, because it is in the plural number. 1 Roll. r. 613. *Piggot and Penrice. Cas. in Eq. Abr.* 209. *Id.*

The limitations here are proper only to the devise of a freehold estate, and therefore the testator did not intend to pass the freehold likewise.

The Attorney General for the defendant.

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The wife of the testator had these very freehold lands settled on her in marriage, and to the heirs of the body of the husband, 1696, and the testator has no other freehold but a little cottage of very small value, so that if the construction contended by the plaintiff should prevail, then the testator gives the defendant nothing but what she was intitled to before.

The circumstances of this case are material; it consists but of a farm, and freehold and leasehold lands are blended together in the hands of one tenant, so that they were not distinguishable.

Now it can never be imagined that the testator meant to manure and tear the estate to pieces, in order to give it away from his own child.

LORD CHANCELLOR,

As the facts are not fully before me upon the evidence on her side, it must go to a trial at law.

It is very material whether all the freehold lands are comprised in the marriage settlement, because if they are, the testator then has given the defendant nothing but what she had before, the construction the plaintiff's counsel contend for should prevail.

If there should be only leasehold estates in the parish, and the testator devises all his estates to A. there is no doubt but the leasehold will pass under this devise (1).

If a testator devises all his estates to A. and has only leasehold, they will pass.

But if there should be both freehold and leasehold, then it will be a considerable question whether any more than the freehold is intended, supposing there should be no settlement of the freehold; as in the case of *Rose v. Bartlet* it was resolved, that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years (2). And if a man hath a lease for years and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will would be merely void.

If a man hath lands in fee, and for years, and deviseth all his lands, the fee-simple pass only; and if he hath a lease for years and no fee-simple, the lease for years passeth, for otherwise the will would be void.

Though in the present case I have no doubt at all as to the intention of the testator, yet the rule of law would prevail.

(1) *Day v. Trig*, 1 P. W. 286. *Ex Riccardson*, 2 Cox's P. W. 409. *Sed vide Addis v. Clement*, 2 P. W. 456.
(2) *So Davis v. Gibbs*, 3 P. W. 26. *Turner v. Huster*, 1 Bro. Cha. Rep. 78.
Chapman v. Hart, 1 Ves. 272. *Pistol v. Lowther v. Cavendish*, Amb. 356.

KNOTFORD V.
GARDINER.

A trial at law
directed on this
issue, whether
the testator had
both freehold and

Therefore let the bill be retained for a twelvemonth (1) the parties proceed to a trial at law upon this issue, whether testator had at the making of his will both freehold and leaf and in the same parish.

both freehold and leasehold, and in the same parish.

(1) And the plaintiff be at liberty to leasehold estates in question. *Re*
proceed to a trial in ejectment for the *A. 1742. fol. 175.*

Case 286.

Oldham versus Hughes, November 20, 1742.

The wife of the
defendant not
capable of chang-
ing the nature
of her estate by
articles, because
under coverture,
and unable to
contract.

*The Queen
habitant of
Margaret
12 Feb. 1757.*

A Bill was brought in order to have twenty thousand p in money, or twenty thousand pounds *South-sea* ann invested in land, pursuant to articles of agreement for that pose. The *Master of the Rolls* decreed the annuities to b and laid out in land, and the present case comes upon an from that decree.

In *September, 1715, M. Deacle*, upon his marriage with *Deacle*, covenanted with trustees that he, his heirs execu administrators, should lay out twenty thousand pounds purchase of land, and settle it to the following uses, *viz.* to self for life, then to the intent that his wife should receive hundred pounds a year for her life, as her jointure, in dower, then to his first and other sons in tail male, w mainder to his own right heirs. *Mr. Deacle* died in 1723, out having laid out the money in a purchase, or leaving an by his wife; his heirs at law were *Mrs. Bourne* his sister was married to *Mr. Bourne* the defendant, and *Mr. Oldham* plaintiff, who was his nephew by another sister. *Mr.* was a freeman of *London*, and as he died without a child, dow by the custom became intitled to a moiety of his p estate; and as to the other moiety, which was the dead man's and distributable, the widow became intitled to one moi that, and *Mr. Bourne* and his wife and *Mr. Oldham* to the moiety, as next of kin: however, upon *Mr. Deacle's* death was a dispute between the widow and next of kin as to th of administration; and upon an agreement it was granted *Bourne* and his wife and *Mr. Oldham*; and articles of agre upon that occasion in 1724 were entered into between th of kin and the widow, who were the only persons intitled personal estate of *Mr. Deacle*; wherein it was cover and agreed that twenty thousand pounds *South-sea* ann should be transferred to trustees, who should sell them, a out the money in land, and settle it to the same uses as the former articles; with this contingent proviso however if the widow died before the money was laid out in land, should go to *Mr. Bourne* and his wife, and *Mr. Oldham*, executors and administrators equally, according to their resp interests; and by these articles *Mr. Bourne* and *Mr. Oldham* venanted for themselves, their heirs, executors and administ

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that if the *South-sea* annuities should fall short to answer Mrs. Deacle's annuity of eight hundred pounds a year, that they would make it good; the annuities were assigned to trustees, and one of them laid out 164 *l.* annihilation money upon them, to make them up twenty thousand pounds *South-sea* annuities: Mrs. Bourne died, whereby Mrs. Oldham became intitled, as heir, to all her real estate; but Mr. Bourne (1), her husband, contended, that these subsequent articles had turned the money, which was realized by the former articles, into personal estate again, whereupon he became intitled to his wife's share, as her administrator.

LORD CHANCELLOR,

As to one moiety of these *South-sea* annuities, Mr. Oldham, the plaintiff, is intitled to it as co-heir to Mr. Deacle, subject only to Mrs. Deacle's annuity; but upon the other moiety, which belonged to Mrs. Bourne, as the other co-heir, arises the present point, which is, whether it is to be considered as real or personal estate; if real, it belongs to Mr. Oldham, as her nephew, and heir at law; if personal, to Mr. Bourne, as her husband.

If this question was to be considered upon the articles in 1715, before Mr. Deacle's marriage, there could be no dispute but that it is to be taken as land (2); but a question now will arise upon the foot of the agreement entered into in 1724; and, upon these articles it is insisted, that the nature of this estate is changed; and whether I take it as twenty thousand pounds in money, or so much *South-sea* annuities, articted to be laid out in land, it is by them converted into personal estate, by the agreement of the parties; and there is no doubt, but if two persons are intitled to money which is articted to be laid out in land, and considered as such, they may agree, before the investiture of it, to take it as personal estate (3), and it shall go as such to their representatives, provided none of the parties were under any incapacity: But I am of opinion, that neither Mrs. Bourne was capable of changing the nature of this estate, because of her being under coverture, and unable to contract, nor, supposing her able to contract, do the articles import any such change.

As to Mrs. Bourne's capacity, if this money is to be considered as real estate, she is a feme covert, and cannot alter the nature of it. Before Mrs. B. could have altered the property, in course of descent, the money must have been invested in land, and there she might have levied a fine of it, and given it to her husband; or upon coming into court, and consenting to take this money as personal estate, and being examined as to such consent, it binds the money articted to be laid out in land, as much as a fine at law would the land, and she might dispose of it to her husband.

At law, money so articted to be laid out in land, is considered barely as money, till an actual investiture, and equity alone views it in the light of real estate, and therefore this court can act upon it, as it can a creature, and do what a fine at common law can upon land.

(1) Mr. Bourne died some time after his wife, and by his will gave away all his personal estate.

(2) *Lingen v. Sowray*, 1 P. W. 172. *Scudamore v. Scudamore*, Prec. Cha. 543. *Tredweny v. Booth*, ante 307. See *Guidot*

v. Guidot, post. 3 vol. 254. and the cases there referred to.

(3) *Vide Crofts v. Aldenbrooke*, and *Fulham v. Jones*, cited in note [C.] 3 P. W. 221. *Edwards v. Warwick*, 2 Cox's P. W. 175. note 1.

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it barely by a contract or deed (1); for, to alter the proper it, or course of descent, this money must be invested in (and sometimes sham purchases have been made for that pose), and she may then levy a fine of the land, and give her husband or any body else: there is a way also of doing without laying the money out in land, and that is, by coming into this court, whereby the wife may consent to take this money as personal estate, and upon her being present in court, and being examined (as a feme covert upon a fine is) as to such contract it binds this money article to be laid out in land, as much fine at law would the land (2), and she may dispose of it to her husband, or any body else; and the reason of it is this, that at law, money so article to be laid out in land, is considered but as money, till an actual investiture, and the equity of this court alone, views it in the light of a real estate; and therefore the court can act upon its own creature, and do what a fine at common law can upon land; and if the wife had craved aid of the court in the manner I have mentioned she might have changed the nature of this money which is realized, but she cannot by deed.

Lord Hardwicke of opinion, the articles in 1724 do not import any variation of this estate, from real to personal, for it being agreed the 20,000*l.* should be transferred to trustees, to buy land, to be settled to the same uses, as in the articles of 1715; there is no doubt but this money is to be considered as realized, and the articles have made no conversion of the estate from real to personal.

As to the articles in 1724, supposing the wife under no ability, I am of opinion that they do not import any variation of this estate from real to personal; for it is there agreed, that twenty thousand pounds shall be transferred to trustees, who are to sell them, and buy land, to be settled to the same uses as the articles of 1715; so far this money is, no doubt, to be considered as realized; and though there is a *proviso*, upon this contingency, *that if the widow dies before the money is invested in land* that then it shall be divided, and go among the next of kin, executors and administrators; yet, as that contingency has happened, and the widow is now living, the original trust subsisting, for the money to be considered as realized; that so, I am of opinion, that the articles have made no conversion of the estate from real to personal, but it still remains real estate, whether it is twenty thousand pounds in money, or so much in *South-sea* annuities.

The whole produce of the 20,000*l.* *S. S.* annuities, is to be laid out, when sold, in the purchase of land, and not 20,000*l.* in money only, as all the parties who had any interest in the personal estate of *D.* agreed they should be transferred to trustees, to sell, and lay out in land, the money arising thereby.

Another question has arose, that, supposing the fund is laid out in land, yet, whether the whole produce of twenty thousand pounds *South-sea* annuities is to be laid out when

(1) *Vide Ireland v. Rittle*, ante 1 vol. 541.

(2) So *Pearson v. Brevelton*, post. 3 vol. 71. *Cunningham v. Moody*, 1 *Ves.* 176. *Binford v. Bowden*, *Ves.* jun. 512. In a case where trustees were to pay the interest of a sum of money to the wife for

her life, the court would not authorize the departure with her life estate, by examining her in the nature of a fine at law. *Frazer v. Baillie*, 1 *Bro. Cha.* 518. See *vide Anon.* 2 *Ves.* 671. *Willats v. Cay*, ante 67, 68.

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or only the sum of twenty thousand pounds is to be taken out of the produce, and invested in a purchase: I am of opinion, the true meaning is, that the whole produce of twenty thousand pounds *South-sea* annuities ought to be laid out in such purchase; and the construction Mr. *Hand* the trustee aims at, would not be answered, if only twenty thousand pounds in money was to be laid out. Mr. *Hand* insists, the twenty thousand pounds *South-sea* annuities, was set apart only as a security for the twenty thousand pounds, and when that sum was raised, the residue was to be considered as part of the personal estate of Mr. *Bourne*. But it ought not to be considered so; for all the parties who had any interest in the personal estate of Mr. *Deacle*, agreeing that twenty thousand pounds *South-sea* annuities should be transferred to trustees, upon trust to sell and lay out in land the money arising thereby, subject to the eight hundred pounds a year annuity, is a good agreement to bind the whole produce of the *South-sea* annuities; for it is an agreement of all the parties who were intitled, wherein each agrees to part with his share, and in this they might have one view, to give better security to Mrs. *Deacle* as to her annuity, and another, to increase the interest of the heirs. But if only twenty thousand pounds was to be laid out, and there should be any surplus from the annuities, it would not go totally from Mr. *Bourne*, but it being part of the estate of Mr. *Deacle*, will be distributable, and Mr. *Bourne* will only have his wife's share.

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Besides, this matter has rested this eighteen years, and there being an agreement, by proper persons, to swell the interest of the heir at law, it would be very hard to deprive him of it.

And if I should agree with Mr. *Hand*, he could only insist upon the value of the annuities at the time of the transaction in 1724, just after the fatal year 1720, when they were very little above par, so that Mrs. *Bourne*'s share would be very trifling.

It has been insisted, that Mrs. *Bourne* could no more agree to turn money into land, than she could land into money; but there I differ, because, as to the share of Mr. *Deacle*, the husband, Mr. *Bourne* was intitled to that, in right of his wife, and had an absolute diminution over it, and he was a party to the agreement; therefore the decree at the *Rolls* must be affirmed, and the articles must be executed according to the express words, and the whole produce of the annuities laid out in land for that purpose.

Another question is, as to one hundred and sixty-four pounds annihilation money laid out by one of the trustees, and, to be sure, he is to have an allowance for it, but out of what fund? It has been said by the plaintiff, it should come out of the estate of Mr. *Bourne*, or the whole personal estate of Mr. *Deacle*. On the part of Mr. *Bourne*, the defendant, it is insisted, that it should come out of the annuity fund itself: and to be sure it must; for if Mr. *Oldham*, the plaintiff, insists, that the annuities are to be vested in land, instead of twenty thousand pounds in money, he must abide by the consequences of that fund, for if it should be reduced, Mr. *Deacle*'s personal estate is not to make good the deficiency.

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ency of it, for it is only bound to make good twenty thousand pounds in money.

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Another point is, as to the indemnity of Mr. *Bourne*, and Mr. *Oldham*, they having covenanted for themselves and their respective heirs, executors and administrators, to make good Mr. *Deacle's* annuity of eight hundred pounds, and by that means have bound their own estates at law. But they are only to be considered as *securities* for Mr. *Deacle*, and are to be indemnified out of his estate. For this arises originally on Mr. *Deacle's* covenant for himself, his heirs, executors and administrators, to settle on Mrs. *Deacle* that annuity; and though Mr. *Bourne* and Mr. *Oldham* are bound as to Mrs. *Hughes*, yet, as to one another, they are intitled to have an indemnity out of Mr. *Deacle's* estate; and Mrs. *Deacle* has a right to have some further fund set apart out of Mr. *Deacle's* estate to supply this annuity, and to indemnify the sureties; and as it depends on Mr. *Deacle's* covenant, which is both for the heirs, and for the executors and administrators, it is a *personal debt*, and to be charged upon his personal estate in the first place, and the real estate is only chargeable on failure of the personal: Lord *Hardwicke* affirmed the decree (1).

(1) *Reg. Lib. B. 1742. fol. 77.*

Cafe 287.

Heneage versus Hunloke, November 22, 1742.

The plaintiff is intitled to the 1000*l.* and 300*l.* and the two freehold houses, under a trust in marriage articles; for an elder daughter, where there is a son, is accounted a younger child.

Vide
Hall. v. Leckup
4. Summ. 7.

Canisbrick
Stelmersdale
Y & L 75.
or d. Barrell

Woodroffe
1. Decr. Ho. 60. 8.

Williamson
Canisbrick

Ch. & F. 15
167.

BY articles of the 2d of *August* 1728, upon the marriage of the plaintiff's father and mother, "it was agreed, that the grandfather of the plaintiff, on the mother's side, should, before the 25th of *December* next, pay to the defendant, the trustee, 1000*l.* and secure to him 300*l.* on bond, to be laid out in the purchase of *South-sea* annuities, in trust to permit the plaintiff's father to receive the interest and dividends thereof during his life: and after his death to permit the wife to receive the interest thereof for her life: and after the death of the survivor, if they should have a son, or one or more younger children, sons or daughters; then upon farther trust to pay the said principal sums to such younger children, if but one, and if more than one, equally to be divided between them: and it was further covenanted, that the plaintiff's grandfather should procure his sister *Frances Flatman*, who was interested in two houses in *Shoe-lane*, to convey all her interest therein to the use of herself for life, to the plaintiff's mother for life, then to her younger child or children in tail general, remainder to the plaintiff's mother in fee."

Frances Flatman, by indenture of lease and release, bearing date the same day with the articles, viz. the 2d of *August* 1728, settled the two houses to the same uses with the articles.

The father and mother are dead, and have left the plaintiff, their daughter and eldest child, and also a son.

She has brought a bill against the trustees, to have a maintenance out of the 1000*l.* and 300*l.* and also out of the rents of the

the two freehold houses, and to have both transferred to her when she comes of age. HENTAGE V. MUNLOCK.

It was insisted for the defendant, the infant son, that as the plaintiff is the eldest child of the marriage, she cannot take the 1000 l. and 300 l. as it is expressed to be a provision for younger children, or at least not the two freehold houses, for that the articles have only gone as to terms for years, for raising portions, and not upon a legal limitation of a freehold estate.

LORD CHANCELLOR,

To be sure, the present case differs, in one respect, from the cases cited, because I do not remember that this construction has ever been made upon a legal limitation.

For, if an ejectment was to be brought, I doubt the plaintiff would find a great difficulty to make out a title under this limitation, she being *the eldest*, would not at law be construed a younger child.

In an ejectment the plaintiff could not have recovered; for, being the eldest, she would not at

law be construed a younger child; but in this court, as the articles are executory, they must be carried into execution, agreeable to the intention of the parties.

But, in this court, as the articles are *executory*, they must be carried into execution, agreeable to the intention of the parties; or it is all one intire provision for the children, as well what is to be paid in money, as what is given by the houses.

Now, younger child or children, in the indentures of lease and release, must be construed analogous, or in conformity to the articles, *videlicet*, any child, exclusive of a son; and what governs my judgment is, that I must take the articles and the indenture as one and the same act, for they are both dated upon one and the same day; and I cannot make a different construction of the deed from the articles; for the legal limitation is to provide for the younger children, or one younger child as much as the other, according to the plain intent of the grandfather, father, mother, and the aunt.

The articles and the indenture of release must be considered as one and the same act, being both dated on one and the same day, and a different construction ought not to be put upon them.

The rule has been rightly laid down by the plaintiff's counsel, that according to all the late cases, an elder daughter, where there is a son, is accounted a younger child (1).

And though the daughter might not have recovered at law, this court would have rectified the mistake (2), as it hath done, where a term in a settlement, for raising portions for younger children, was placed after an estate-tail, which should have been before, and this in two instances, one before Sir Joseph Jekyll, in the case of *Uvedale versus Halfpenny*, 2 P. Wms. 151.*

Where a term for raising portions is placed after an estate-tail, which should have been before, this court will rectify the mistake.

(1) So *Beale v. Beale*, 1 P. W. 244. *Head v. Carter*, 1 Cha. Rep. 224. *Butler v. Duncombe*, 1 P. W. 451. *Pierfon v. Burt*, 2 Bro. Cha. Rep. 38. *Billings v. Wills*, post. 3 vol. 221. *Vide etiam* *Melman v. Seymour*, 1 Vesf. 210. *Tyn-*

ham v. Webb, 2 Vesf. 198. *Duke v. Doidge*, 2 Vesf. 203. *Broadmead v. Wood*, 1 Bro. Cha. Rep. 77. *Hall v. Hewer*, Amb. 203.

(2) *Simpson v. Vaughan*, ante 33. note 1.

* In a marriage settlement, a term for years, for securing younger children's portions, was by mistake made subsequent to the estate-tail limited to the sons; Sir Joseph Jekyll set it right according to the intention and agreement of the parties. *Halfpenny versus Uvedale*.

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HUNLOCK.**

Lord *Hardwicke* declared, that, according to the true intent and meaning of the indenture of the second of *August* 1728, the plaintiff is intitled to the two sums of 1000 *l.* and 300 *l.* and to the *South-sea* annuities purchased with the 1000 *l.* and to the freehold houses in *Shoe-lane*, as a daughter of *Thomas Heneage* and *Anna Maria* his wife, the defendant *George Heneage* being the only son of the marriage, and ordered the Master to take an account of the dividends of the *South-sea* annuities and of the rents of the two houses received by the defendants, and to allow the clear produce thereof for the plaintiff's maintenance for the time past, and till she attains twenty-one; and if the 300 *l.* or any part, can be recovered, he directed it to be placed out in the purchase of *South-sea* annuities in trust for the plaintiff; and also decreed that the plaintiff should hold the two houses to her and the heirs of her body, till twenty-one; and afterwards that the defendant *George Heneage* do convey them to the plaintiff in tail general, with remainder to *George* in fee, unless within six months after his attaining his age of twenty-one, or being served with a *subpena* for that purpose, he shall shew unto this court good cause to the contrary (1).

(1) *Reg. Lib. A. 1742. fol. 93.*

Case 288. *Lady Dorothy Saville, and Lady Mary Saville,*
by their Guardian, and also the Executrixes of
Lady Essex Saville deceased, by Bill of Re- } Plaintiffs.
vivor

Sir George Saville and others, May 24, 1720, Defendants.

Mr. Justice

* *Tracy* held, that the lands of which Marquis *William* was seised in fee, and devised to his daughters in tail, were not such an estate of inheritance, as will be a satisfaction of the portions for his daughters by the second wife, because they claim these lands by purchase and the proviso in the marriage settlement restrains the satisfaction, to lands coming to the daughters by descent from their father (1).

THE questions in the cause arose upon this case.

“ By conveyance, dated the 19th and 20th of *February* 1694, made upon the intended second marriage of *William* Lord *Eland*, eldest son of *George* Marquis of *Halifax*, with Lady *Mary Finch*; after the usual limitations, there was a term created of 500 years, charged upon all the manors and lands in *Nottinghamshire* and *Yorkshire*, comprised in the marriage settlement, and the trust of it was declared to be, that in case

* The nearness of relation between the late Mr. Justice *Tracy* and me, and the great reverence and esteem in which his name is still held by the profession of the law, I make no doubt will sufficiently plead my excuse for giving this case to the publick, in which he has so greatly distinguished himself, in the opinion he communicated by letter to Lord *Macclesfield*, being disabled, through illness, to attend in court, especially as I cannot find it is reported in any book [1] whatever.

[1] This case is reported in *Select Cases in Chancery*, 32.

(1) *Vide Watson v. Earl Lincoln, Amb. 325.* and the note to *Bellefleur v. Utterton*, ante 1 vol. 426.

“ there

etc should be a failure of issue male of the second marriage, and there should be one or more daughter or daughters, that the trustees should by sale or mortgage of the premises, for and during the term after the commencement thereof, raise, but one daughter 20,000 l. if two or more 25,000 l. equally to be divided, and to be paid to them when they respectively attain their age of sixteen, or days of marriage, which should first happen: and in case any of the daughters should die before the portions come payable, to go to the survivors, and to be paid to them at such time as the original portions; if but one daughter, she to have 300 l. per ann. till 12 years of age, and afterwards 500 l. per ann. for maintenance till her portion become payable; if more daughters, 200 l. per ann. a-piece, till 12, and afterwards 300 l. per ann. maintenance, to be paid at Michaelmas or Lady-day, which should first happen after the commencement of the said term; provided, or in case lands or reverts of an estate of inheritance shall descend to the said daughters from Lord Eland, of as great value to be sold, as the portions thereby for them intended, then the 500 years term shall cease and be void, for the benefit of the person who shall be next in reversion or remainder of the said manors, &c."

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Taylor
Harrison
J. Hall 3,

The marriage took effect, and Marquis George, by conveyance dated the 1st and 2d of March 1694, reciting the deed of February 1694, and the several estates therein limited; and at the reversion and inheritance of the premises, from and after the determination of the said estates, was limited to him and his heirs, did, in consideration of his name and family, and to support the same, in case neither he nor his son Lord Eland should leave any issue male, settle the said premises upon George, now Sir George Saville, Baronet, for 99 years, if he lived so long, without impeachment of waste, and to his first and other sons in tail male, with several remainders to other persons, with the like limitations."

Marquis George being likewise seised in fee of several other manors and lands in other counties, and having the reversion in several divers manors, &c. expectant upon the decease of the now duchess Dowager of Halifax, and likewise the reversion and inheritance in fee-simple, of and in several fee-farm rents, expectant upon the decease of Catharine Queen Dowager, made till March 17, 1691, and thereby "gave his house at Aiton Middlesex, to his wife for life, and after her decease to Lord Eland and his heirs;" and then devises as follows: "As to all my lands not comprehended in the settlement made upon my son's marriage, I give them to my son Lord Eland, and to the heirs of his body, and for want of such issue, to my daughter Stanhope; and made Lord Eland sole executor."

Marquis George died without any other issue male than Lord Eland, who proved the will; and he being seised under the will beforementioned, by lease and release, on the 17th and 18th day 1695, "declared the uses of an intended recovery of several manors, lands, &c. in the counties of Northampton, Derby, York, Nottingham, Middlesex, and Surry, to be to him

"and

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"and his heirs;" and afterwards, by lease and release, dated the 5th and 6th of *July* 1695, "Marquis *William* did settle the same manors, &c. to the use of himself for life, and after his decease to the use of such person, and for such estate, as he by any writing, signed in the presence of three or more witnesses, or by his last will, signed in like manner, should declare, limit and appoint; and in default of such declaration, limitation and appointment, then, after his death, to his first and other sons in tail male, and in default of such issue, to all and every his daughters, and the heirs of their body issuing, and in default of such issue, to the use of the said *Lady Stanhope*, and the heirs of her body, and in default of such issue, to the right heirs of Marquis *George* for ever."

Marquis *William*, by a codicil to his will, dated the 20th of *August* 1700, signed in the presence of three witnesses, therein reciting the deed of recovery, &c. "devised all his said manors, &c. to his executors for 500 years upon trust by sale or mortgage to raise (in case he had no son) the sum of 5000 *l.* a-piece, additional portions for each of his daughters, to be paid to them at sixteen, or marriage, and subject to the said term, he devised all the said manors, lands, &c. to his first and other sons in tail male; and in default of such issue, to remain and be to such use, and for such estate, as are thereof declared in and by the said indentures of lease and release of the 5th and 6th of *July* 1695."

On *May* the 31st, 1700, Marquis *William* died without any issue male; but by his first Lady had issue *Lady Ann Bruce*, and by his second, three daughters, *Lady Essex*, *Lady Dorothy*, and *Lady Mary Saville*, two born in his life, and the other since his decease.

George Saville, now Sir *George*, after Marquis *William's* decease, entered upon the lands in *Nottinghamshire* and *Yorkshire*, conveyed to him by the deed of *March* 1694, subject to the several charges as aforesaid, and received the rents thereof due at *Michaelmas* 1700, and has ever since paid the maintenance of Marquis *William's* three daughters till the *Lady-day* next before they respectively arrived at their ages of 16 years, which they have all since attained unto.

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* Sir *Joseph*
Jekyll.

This cause underwent great debate, Lord *Macclesfield* being assisted by Lord Chief Justice *Pratt*, the Master of the Rolls*, Lord Chief Justice *King*, and Mr. Justice *Tracy*, who all, except the last, delivered their opinions in court, *May* 24, 1720, but he being ill, wrote the following letter to Lord *Macclesfield* the night before.

May 23, 1720.

My Lord,

"Not being able by reason of my indisposition to appear in court to-morrow to deliver my opinion in the cause of *Saville* versus *Saville*, (which I was prepared to do), I have, in obedience to your Lordship's commands, sent your Lordship my opinion in writing upon the several points that were debated
" by

by counsel at the bar, and I thought it not proper to take notice of any other.

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First point, Whether lands of which Marquis *William* was led in fee, and devised to his daughters in tail, the remainder the Lady *Stanhope*, &c. are such an estate of inheritance as shall (in proportion to their value) be a discharge or satisfaction of the portions for his daughters by his second wife, within the meaning the proviso in his second marriage settlement.

"I am clearly of opinion they are not, because the daughters claim those lands by purchase; and I think the proviso plainly restrains the satisfaction to lands coming to the daughters by descent from their father."

Second point. Whether the lands descending to the said daughters from their father, and which ought to go in satisfaction their portions, ought to be valued as at the time of the descent, when their portions became due.

"I am of opinion that the valuations ought to be made according to the values and circumstances of the lands at the time of the descent: for the proviso is express, That if lands of as great value as the portions descend, the term of 500 years is to cease. And till the valuations made, it cannot be known whether the lands are a full or only a partial satisfaction."

The valuation of the lands descending to the daughters from their father, must be made according to the value of the lands at the time of the descent; for till

valuation made, it cannot be known whether they are a full or a partial satisfaction.

Third point. Whether lands descended from Marquis *William* his daughters by his second wife in tail, are such an estate of inheritance descended from him as is within the meaning of the said proviso.

"I am of opinion they are not, especially being attended with the circumstances that appear in this case."

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The lands descended from

Marquis *William* to his daughter in tail, are not such an estate of inheritance as is within the meaning the proviso, for such an inheritance was intended as is of certain value, an estate of inheritance in fee-simple.

"First, from the uncertainty there must be in the valuations: for the valuations being to be made at the time of the descent, when Lady *Essex* (the eldest daughter of the three daughters) was but two years old, and the youngest not born, how could the contingencies of their dying without issue before they or their issue attained the age of 21, to suffer recoveries, be valid? It is impossible there should be any certain measure or rule for such a valuation: and it is hard to think, it could ever be intended that portions (which are so much money certain) should receive a satisfaction by values to be made merely at random, and by fancy: and therefore it is more reasonable to think, that such an estate of inheritance was intended as is of a certain value, and that is an estate of inheritance in fee-simple.

"But secondly, I conceive the objection against a satisfaction of the portions by the descent of an estate-tail is more strong
" by

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" by the circumstance of the remainder's being in Lady *Stanhope*;
" and Marquis *William*'s having a daughter (the Lady *Bruce*) by
" his first wife.

" For such an estate might descend to the daughters by the
" second wife to the full value of 25,000 *l.* and so the term of
" 500 years would cease, and the portions be discharged, and
" yet the three daughters by the second wife might not have
" near the value of the portions designed them by the settle-
" ment.

" For by the express provision of the settlement, if one of the
" three daughters died before her portion become payable, her
" portion is limited over to her two surviving sisters; but in that
" case her share in the estate would have gone equally to my
" Lady *Bruce*.

" And thirdly, If two of the three daughters had died before
" their portions became due, the loss to the survivor had been
" still greater.

" And therefore the words (an estate of inheritance) being of
" an ambiguous sense, and importing likewise (if not more
" strongly) an estate in fee-simple: and when such an estate is
" properly an equivalent, as it is an absolute estate in the land,
" as there an absolute interest in the portions, and as it would
" descend as the portions would have gone;

" Surely by all rules of construction, the words ought to be
" taken in that sense which is consistent with the whole design
" of the settlement, and not in that which would defeat it in so
" material a part, as the benefit of survivorship amongst the three
" daughters.

Fourth point. Whether the reversions in tail expectant upon
the deaths of Lady Dowager *Hallifax*, and the late Queen Dow-
ager, are such estates of inheritance descended from Marquis
William to his daughters by his second wife, as are within the
intent and meaning of the proviso.

The reversions
in tail, expectant
on the deaths of
Lady Dowager
Hallifax and the
late Queen Dow-
ager, are not such
estates of inher-
itance descended from Marquis *William* as are within the intent of the proviso.

" Having delivered my opinion before upon the descent of an
" estate-tail in possession, it follows I can be under no doubt as
" to those reversions, because the reasons I have offered before
" hold more strongly against them: and I have no occasion
" to mention the further objections that were made against
" them.

" As to a reversion in fee which was mentioned at the bar,
" upon the argument of the other points, I do not find there is
" any such estate in the case, and therefore I shall give no opi-
" nion in it."

Fifth point. The only remaining one, I think, that was de-
bated at the bar, was, whether Sir *George Saville* shall account
for the rents and profits of his estates, and for the value of the
timber cut down and sold by him, to the end that they may be
applied towards raising the daughters' portion.

" I am of opinion he shall not.

" It

" It was said at the bar (and not denied I think by the other side), that the constant course of the court in the like cases has been, that the tenant for life shall keep down the interest by the rents and profits (1), but that the portions, or the principal money due upon any other incumbrance, shall be borne by the whole estate.

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The course of the court with regard to a tenant for life is, that he shall keep down the interest by rents

profits, but portions or principal money on any other incumbrance, shall be borne by the whole estate; and therefore Sir George Saville shall not account for the rents or the value of the timber cut on, in order they may be applied towards raising the daughters' portions.

' And this seems reasonable, especially in this case: for with respect to the daughters, they have nothing more to desire but to be secure of their portions, and that they are beyond all doubt, by a sale or mortgage of part of the great estate that is charged with them.

' And with respect to those in remainder, when Marquis George preferred Sir George Saville to be the first who should enjoy his paternal estate, to support his name, and the honour of his family, he could never intend to distress Sir George, and put him into a starving condition (2) for the sake of those in remainder, who were more remote in his consideration.

' And as for the timber, Sir George had by his settlement a power to cut what he pleased as a part of the profits of his estate, and as those in remainder could not have come by their bill in this court, and have stopped him from cutting down the timber, or have prayed now that the portions should be raised out of it, if it had been standing; neither I think ought they to have any benefit by it, now it is actually cut down and sold.

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My Lord,

" If I had delivered my opinion in court, I should have enlarged and enforced the reasons I have here given, several ways: but I should rather have contracted them upon this occasion, if I had had more time and less pain; but indeed I received your Lordship's commands so late this evening, that I could not so much as get this hasty writing fairly transcribed, and therefore I hope it will be excused.

I am

Your Lordship's most obedient,

And humble Servant,

Robert Tracy.

(1) *Partridge v. Pawlet*, ante 1 vol. 7.

(2) *Vide ante* 416. 1 Ves. 95.

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Lord Chief Jus-
tice Pratt, Sir
Joseph Jekyll,
and Lord Chief

Justice King, de-

livered their opinion in court, which agreed with Mr. Justice Tracy's, and Lord Macclesfield concur-
gave judgment accordingly.

On the 24th of May 1720, the two Chief Justices and the Master of the Rolls delivered their opinion in court, which agreed with Mr. Justice Tracy's in every respect, and Lord Macclesfield concurring with them, gave judgment upon the several points, in the manner they have been already stated.

First, That a valuation ought to be put upon the lands descended to the plaintiffs, the daughters of Marquis William (a equivalent for the 25,000 l.) as the same were worth to be at the time of such descent, and from that time the trust term 500 years ought to cease: but if the value of the descended land be not equal to the portions intended to be raised, then the trust to continue in trust to raise the residue.

Secondly, That whatever lands the daughters take by the will of their father, they take not by descent, but as purchasers, such lands can be no part of the equivalent.

Thirdly, That the estate-tail descended to the three daughters and Lady Bruce, as heirs of the body of their father, remain to Lady Stanhope, either in possession or expectant on the death of the late Queen Dowager and the Lady Marchioness Dowager: is no satisfaction of the portion, or any part thereof: but if the estate in fee-simple descended to them from their father in possession, reversion expectant on any term for years, that ought to go to their satisfaction.

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Fourthly, That what the defendant Sir George Saville raised by timber or other profits of the trust-estate ought not to be accounted for, nor applied towards the discharge of the plaintiffs' portions, for the estate is no more than a security for the 25,000 l. with interest till the same shall be paid, and that Sir George Saville is in the nature of a mortgagor in possession, and the estate is no more than of value sufficient to answer the said portions and interest, he is not subject to account or to refund the money raised by him for the timber sold, or other profits by him made.

Case 289.

Saunders versus Drake, November 27, 1742.

A testator who
lived in Jamaica
gives legacies
to be paid in
sterling money

in the first place, and the two legacies immediately following, generally, without saying in money, and at the end of his will several more to be paid in sterling money. Lord Hardwicke held the plaintiff must take his legacy in Jamaica money, for his expressing himself differently, and different intention (1).

THE question in this cause arose upon the will of one Wilson, who at the time of making it, and for several years before, lived in Jamaica.

The testator by his will gives legacies to be paid in Jamaica money in the first place, and the two legacies immediately following, generally, without saying in money, and at the end of his will several more to be paid in sterling money. Lord Hardwicke held the plaintiff must take his legacy in Jamaica money, for his expressing himself differently, and different intention (1).

(1) Wallis v. Brightwell. 2 P. W. 88. Pierfon v. Garnett, 2 Bro. Cha. R. 47. Malcolm v. Martin, 3 Bro. Cha. Rep. 50. S. P.

owing these (one of which is the plaintiff's) he gives generally, without saying to be paid in *sterling money*: then he devises his real estate, and gives some specific legacies; and lastly, several more legacies to be paid in *sterling money*.

The plaintiff has brought his bill for his legacy of 300*l.* and insists the defendant, who is the executor, but no ways interested, should pay him in *sterling money*.

Mr. Attorney General for the plaintiff argued, that putting these general legacies close to the *sterling*, they shall have the same construction by apposition: and as the testator has money both in *Jamaica* and *England*, why should not the plaintiff's legacy be paid in *sterling money*, especially as it is given to a person in *England*.

The counsel of the other side insisted, that in *Jamaica*, where money is mentioned generally, it is always understood to be the current money of *Jamaica*.

LORD CHANCELLOR,

It is impossible for me to tell what was the testator's intention; but I must make a construction from the words.

The general rule that has been laid down on the part of the defendant is true; for if a bond be given at *Dublin*, or a note at *Jamaica*, it must be paid in the current money (1).

SAUNDERS v. DRAKE.

Young v. Maitland
18. Febr. 1794.

Gates v. Maddison
16 Febr. 1815.

A bond given at *Dublin*, or a note in *Jamaica*, must be paid in the current money; the same with regard to a will.

So if in either place there is a sum of money left by will, it will be paid to the legatee in current money.

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Then the question will be, if there is any thing in the present case to take it out of the general rule.

If the testator had given all his legacies generally, undoubtedly they must have been paid in *Jamaica* money, nor would the legatees living in *England* have made any distinction, for the residence of the person devising must decide it.

The legatees living in *England* makes no distinction, for the residence of the person devising must decide it.

Every thing in this will shews it must mean *Jamaica* money; if all the legacies given generally would confine it to *Jamaica* money, *a fortiori*, if the testator gives some *sterling*, and others generally, the latter must be paid out of *Jamaica* money, for his expressing himself differently shews a different intention.

It is said on the part of the plaintiff, that his legacy immediately following the *sterling* legacies, it must be taken as a continuation of the same intention.

And there might have been something in this argument, if there had not been in the latter end of the will other *sterling* legacies, which takes away the force of this argument entirely.

There has been an endeavour likewise to raise an argument on the part of the plaintiff, from the testator's effects being partly in *Jamaica*, and partly in *England*.

Though the effects are partly in *Jamaica*, and partly in *England*, yet as this

bequeaths a compound residue, without separating the funds, no argument can be drawn from it in favour of the plaintiff.

(1) *Vide Connor v. Earl of Bellamont*, ante 382.

SAUNDERS V.
DRAKE.

And to be sure, if the testator had separated his funds in *Jamaica and England*, and had charged his legacies which he has given generally upon the *English* money, it would have been an argument of considerable weight.

But as it is a devise of a compounded residue, and he directs his debts to be paid generally out of the whole personal estate without separating the funds, this argument falls to the ground; and therefore upon the whole the plaintiff must take his legacy in *Jamaica* money (1).

(1) And his lordship directed the master, "to compute interest, from the end of one year after the death of the testator according to the rate of interest in the *island of Jamaica*." *Reg. Lib. B. 1742. fol. 55.* So *Halme v. Allwright*, cited 2

Bro. Cha. Rep. 2 But in *Malcolm v. Maria* 3 *Bro. Cha. Rep. 50.* the master of the Rolls decreed interest at 4 per cent. tho' the legacy was held to be current money of *Antigua*.

Case 290.
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Fleetwood versus Jansen and Mennill, November 29, 1742.

LORD CHANCELLOR,

A motion for further time to redeem a mortgage, and that it should stand as a

security only for what was *bonâ fide* advanced, but forfeited as to what was won at play: Lord Hardwicke said, as *Mr. Fleetwood*, in a former cause, where he might have done it, did not insist on a redemption the foreclosures could not regularly be kept open, but on the whole circumstances allowed three months

A Motion is made on behalf of the plaintiff for further time to redeem the mortgage, which was originally given to *Mr. Delmee*, and by him assigned to the defendants.

And it was insisted by the plaintiff's counsel, that the mortgages which *Jansen* and *Mennill* have upon his estate, ought to stand only as a security for so much as has been *bonâ fide* advanced and shall be forfeited as to what was won at play.

To be sure the enforcing the gaming act is not merely confined to the interest of private persons, but is of great consequence to the publick, and so I have always thought it when I sat in the other court.

in the
Hock
Joung 361 -
The enforcing the gaming act is of great consequence to the publick, and not confined to the interest of private persons.

Though gamblers call them debts of honour, yet this court thinks it false honour, and that the person who informs, has done a meritorious act.

And, as in other crimes, accomplices are always encouraged so more especially ought they to be in these cases, for notwithstanding among Gamblers themselves, they call it *honour* in debts of honour, I think it *false honour*, and that a person who opens and discovers these practices, has done a meritorious action.

But though it may be the rule, yet the circumstances of the case are particular, and will not fall within all the general rule.

The defendants, with *Mr. Delmee's* and their own mortgage have at least 69,000*l.* upon the plaintiff's estate.

And upon a valuation of the mortgaged premises, which stretched to the very utmost, it does not amount to more than 80,000*l.* and when it comes to be sold, it is not very probable

at any purchaser will give more than 70,000*l.* with such a large cumbrance upon it. FLEETWOOD V. JANSEN.

The mortgage assigned by Mr. *Delmee*, to *Jansen* and *Mennill*, 46,000*l.* and allowed by the plaintiff to be a fair mortgage.

And if *Jansen* and *Mennill* had not taken this mortgage of Mr. *Delmee*, he would undoubtedly have been intitled to have foreclosed them both: and as *Fleetwood* (in the old cause between Mr. *Delmee*, plaintiff, upon a bill of foreclosure, *Jansen*, *Mennill* and *Fleetwood*, defendants) never insisted upon a redemption at the hearing, nor even before a master; consider, whether it could not introduce a dangerous precedent in this court, to admit him to redeem now, after he has acquiesced under the foreclosure in the former cause; and whether it is not better that a private person should suffer an inconvenience, rather than a general one should arise to the publick.

What is the rule at law upon a *scire facias* taken out on a judgment? Why, that a defendant shall not insist upon any thing but what might have been insisted on at the hearing of the original cause.

Upon a *scire facias* taken out on a judgment, a defendant shall insist only on

what he might have done at the hearing of the original cause.

So is the rule in equity, with this variation, that if any thing new has happened since the hearing, the defendant may take advantage of it.

The rule in equity is the same with this difference only, that if any thing

new has happened, since the hearing, defendant may avail himself of it.

This is the case upon the old bill.

Then what is the equity upon the new? Why, that the whole money secured upon Mr. *Fleetwood's* estate (except Mr. *Delmee's* mortgage) is forfeited to the heir at law of *Fleetwood*, as being won by him by virtue of the gaming act; and that the heir at law has assigned over the whole benefit to a trustee, in trust for Mr. *Fleetwood*, who now brings his bill, and insists upon being let to a redemption, on paying the defendants only what shall appear to be justly and *bona fide* lent.

But I am of opinion, that, regularly, I cannot keep open this foreclosure, neither will it be any great benefit to the plaintiff to do it, because he will have the advantage of any equity at the hearing, which may arise from his bill, notwithstanding the foreclosure.

However, upon the whole circumstances of the case, I will allow the plaintiff three months more to get the money for redeeming Mr. *Delmee's* mortgage, and that to be peremptory.

Case 291.

S. C. cited, post
488.

Incumbent on
courts of justice
to preserve their
proceedings from
being misrep-
resented; and the
minds of the
publick should
not be prejudiced
before a cause is
heard.

L. Charles
u. D. M. p. 316

Moss v. Smith
Case 331.

Went Van Sinder
1. Phillips 445-7

anford Case
3. P. B. 613.

Whether a libel
be publick, or
private, the only
method is to
proceed at law;
and this court
has no cogniz-
ance, unless it is a contempt, by being an abuse of their proceedings.

First Seal after Michaelmas Term, December 3, 1742.

A Motion against the printer of the *Champion*, and the printer of the *St. James's Evening Post*; that the former who is already in the *Fleet*, may be committed close prisoner; and that the other, who is at large, may be committed to the *Fleet*, for publishing a libel against Mr. Hall and Mr. Garden, (executors of *John Roach*, Esq. late major of the garrison of *Fort St. George*, in the *East Indies*); and for reflecting likewise upon Governor *Mackray*, Governor *Pitt*, and others, taxing them with turning affidavit men, &c. in the cause now depending in this court, between Mrs. *Roach* and the executors: and insisting that the publishing such a paper is a high contempt of this court, for which they ought to be committed.

LORD CHANCELLOR,

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard (1).

It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced.

But, to be sure, Mr. Solicitor General has put it upon the right footing, that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it: For whether it is a libel against the publick or private persons, the only method is to proceed at law.

By being an abuse of their proceedings.

The defendant's counsel have endeavoured two things: 1st. To shew this paper does not contain defamatory matter. 2^d. If it does, yet there is no abuse upon the proceedings of the court, and therefore there is no room for me to interpose.

Now, take the whole together, though the letter is artfully penned, there can remain no doubt, in every common reader at a coffee-house, but this is a defamatory libel.

For after he has laid down the plan of the paper in the manner:

"It has been observed long ago, that the Roman Catholics are very zealous for the propagation of their religion, and that they stick at nothing, though ever so scandalous, to compass their ends." "We have had lately a most shocking instance of it."

Then it goes on, and treats of persons, some *Paris*, and others at *London*; and it is very plain, that it is relative to the executors of Major *Roach* parties in this cause, notwith-

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Printing initial
letters will not
protect a libel-
lar.

(1) Vide *Baker v. Hart*, post 488. *Mrs. Farley's case*, 2 *Ves.* 520.

ending there are only initial letters of their names, and
ices of abode, in the manner following: "*He has appointed*
(meaning *Major Roach*) T—— H——l, of G——
O——d S——t, and F——G——n of the T——e,
his E——rs."

All the libellers of the kingdom know now, that printing
tial letters will not serve their turn, for that objection has been
ig got over.

The bill in chancery, mentioned in the last paragraph of
: first column, can be applicable only to this cause; for the
rds are, "*She (meaning Mrs. Roach) came back to London, and*
filed a bill in chancery against the two E——rs, in order to
call them to an account."

It is plain therefore who is meant; and as a jury, if this fact
s before them, could make no doubt, so, as I am a judge of
ts, as well as law, I can make none.

I might mention several strong cases, where even feigned
nes have been construed a libel upon those persons who were
lly meant to be libelled.

I shall take notice but of one, and that is the case of Mrs.
dl, who printed a letter abusing the late King, under the
ne of *Merriweis Sophy of Persia*; it was tried before a jury of
tlemen of great honour, who were so well satisfied of the real
ining, that, notwithstanding the whole was concealed under
itious names, they found the publisher guilty.

Next, as to the expression in the paper, that "*There were,*
seen here in England, some gentlemen of note and character,
who did not scruple to turn affidavit men." Mr. Solicitor
eral has insisted, this may be taken in a good sense, as
l as a bad one, because a man who swears true, is as much
ffidavit man, as if he swears false, and the court should take
i *mitiori sensu*.

I will not take upon me to say, whether upon an action
aw, this could be supported as libellous upon the strict
s.

ut, I believe, there is no body who is conversant in the
eedings of this court, but must know, that this expression
ns persons who are ready, upon all occasions, to make affi-
ts, without regarding whether they have any conscience of the
i.

[471]
Calling a person
an affidavit man
is libellous, for
it means a man
who is ready to
swear on all oc-
casions, without any conscience of the fact

cations, without any conscience of the fact

pon the whole, as to the libellous part, if so far there
ld remain any doubt, whether the executors are meant, it
ar, beyond all contradiction, upon the last paragraph, in
h are these words, "*This case ought to be a warning to all*
thers, to take care with whom they trust their children, and
their fortunes, lest their own characters, their widows, and their
ildren, be aspersed, and their fortunes squandered away in law-
suits."

And likewise, though not in so strong a degree, the words, *turned affidavit men*, is a libel against those gentlemen who have made them.

It is insisted that the following words, (*"This cause, which has been long depending, in chancery here, was at last determined, on Wednesday the 3d Instant, by the Right Honourable the Lord High Chancellor. A great many persons, who, as well as I, were concerned for Mrs. Roach, and impatient to know the issue of that affair, went that day to Lincoln's-inn hall, and we were every one of us extremely pleased when we heard that most upright magistrate's decree, by which the Master's report was confirmed, and the Right Honourable the Lord Barrimore appointed guardian,"*) are not a contempt of this court, because here is no misrepresentation of facts, and the court spoke of with great respect.

And indeed, it is very true, but then this is colourable only, and such colours shall never impose upon the court.

Three kind of contempts, scandalizing the court;

There are three different sorts of contempt.

abusing parties; and prejudicing mankind before a cause is heard.

One kind of contempt is, scandalizing the court itself.

There may be likewise a contempt of this court, in abusing parties who are concerned in causes here.

There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.

There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

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The printer of the Gloucester Journal, calling his advertisement *A hue and cry after a Commission of Charitable Uses*, was held to be a libel, and the court committed him.

The case of *Rakes*, the Printer of the Gloucester Journal, who published a libel, in one of the Journals, against the Commissioners of Charitable Uses at Burford, calling his advertisement, *A hue and cry after a Commission of Charitable Uses*, was of the same kind as this, and the court in that case committed him.

Printing a brief before the cause comes on is a contempt, as it is prejudicing the world with regard to the merits.

There are several other cases of this kind; one strong instance, where there was nothing reflecting upon the court, in the case of Captain *Perry*, who printed his brief before the cause came on; the offence did not consist in the printing, for any man may give a printed brief, as well as a written one, to counsel; but the contempt of this court, was prejudicing the world with regard to the merits of the cause before it was heard.

Upon the whole, there is no doubt, but this is a contempt of the court.

With regard to Mrs. *Read*, the publisher of the *St. James's Evening Post*, by way of alleviation, it is said, that she did not know the nature of the paper; and that printing papers and pamphlets, is a trade, and what she gets her livelihood by.

But

But, though it is true, this is a trade, yet they must take care to do it with prudence and caution; for if they print any thing that is libellous, it is no excuse, to say, that the printer had no knowledge of the contents, and was intirely ignorant of its being libellous; and so is the rule at law, and I will always adhere to the strict rules of law in these cases.

If a printer prints any thing that is libellous, it is no excuse to say that he had no knowledge of the contents.

Therefore Mrs. Read must be committed to the *Fleet*, according to the common order of the court upon contempts.

But as to Mr. Huggonson, who is already a prisoner in the *Fleet*, I do not think this any motive for compassion; because these persons generally take the advantage of their being prisoners, to print any libellous or defamatory matter which is brought to them, without scruple or hesitation.

If these printers had disclosed the name of the person who brought this paper to them, there might have been something said in mitigation of their offence; but as they think proper to conceal it, I must order Mrs. Read to be committed to the *Fleet*, and Huggonson to be taken into close custody of the warden of the *Fleet*.

It is a mitigation of the printer's offence, if he will discover the person who brought the paper to him.

Green an Infant versus Ekins, Burnaby and Elizabeth his Wife, and others, December 6, 1742.

[473]

A Bill was brought by the plaintiff, who is the eldest son of the defendant *Burnaby*, by *Elizabeth* his wife, who was the only daughter of Mr. *Green*, deceased, by his first wife, to have the trusts of the will of Mr. *Green*, his grandfather, performed, and to have marriage articles, made before the marriage of his father and mother, carried into execution, for his benefit, upon the following case.

Case 292.
S. C. 3 P. W.
306. N. F.
S. C. cited, a
Vef. 430.

Mr. *Green*, who was a brewer, had issue by his first wife, the defendant *Elizabeth*, who, in his life-time, had privately, and without his consent, married Mr. *Burnaby*; and by his second wife had issue another daughter, named *Frances*, who, at the time of making this will, and at his death was an infant; and having a very considerable real estate, and a very large personal estate, devised several particular legacies to his wife, and to Mrs. *Burnaby*, and his daughter *Frances*; and gave directions to have his trade carried on after his death, for the benefit of those who should be intitled to the residue of his estate: and all the residue of his personal estate, he devised to any son he should have by his wife, at his age of twenty-one; and if no son, then to his daughter *Frances*, to be paid to her at her age of twenty-one, or marriage: but if it should happen, that his daughter *Frances* should depart this life before twenty-one, or marriage, and he should have no other daughter born of his second wife, who should attain twenty-one, or marriage, then, and in such case, if his daughter *Elizabeth Burnaby* should have issue of her body one or more son or sons, he gave and bequeathed the residue of his personal estate to such son of his said

The question was whether the interest of the residue of G.'s personal estate, from the death of *Frances* his daughter to the time it will vest in the plaintiff his grandson, must be accumulated, or whether it is an interest undisposed of, and goes to the next of kin of the testator. Lord Hardwicke was of opinion, that the interest must accumulate, and is a part of the residue, till he arrive to the son of Mr. *Burnaby* vests.

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daughter as should first attain the age of twenty-one; but if his daughter should have no such son or sons, or having such son or sons, none should attain the age of twenty-one, then, and in such case, he gave and bequeathed the residue of his personal estate to *William Ekins Pier*, a defendant in this cause, subject to the payment of 4000*l.* to the daughter of his daughter *Burnaby*, in manner therein mentioned.

Mr. *Green*, soon after making this will, died, and within half a year after his death, *Frances*, his daughter, died an infant, and the plaintiff being intitled, when of age, to the residue of this estate, brought his bill: and upon this part of the case, the only question was, whether the interest of the residue of this personal estate, from the death of *Frances*, the daughter, to the time it will vest in the plaintiff, or any other son of Mrs. *Burnaby*, must be accumulated, and wait on the contingency; or whether (as the defendants contend) it is an interest undisposed of, and goes to the next of kin of Mr. *Green*, the testator.

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Elizabeth Burnaby, by an agreement made on her father and mother's marriage, was intitled to 6000*l.* Mr. *Burnaby*, just before his marriage, signed a paper, whereby he agreed, that every thing which should

come to *Elizabeth*, by her father's death should go to them for their respective lives, and after the death of the survivor, to the heirs of the body of *Elizabeth* by him begotten: as this was a limitation to the heirs of the wife, it vested in her only, and the husband consenting, he decreed the 6000*l.* to be settled on her younger children.

As to the marriage articles, the case was, Mrs. *Elizabeth Burnaby* was under an agreement in writing, made on her father and mother's marriage, intitled to the sum of 6000*l.* and had also expectancies on the death of her father; and Mr. *Burnaby*'s marriage with her being private, he, just before the marriage, drew up, and signed, a very short paper, by way of articles, whereby it was agreed, that every thing which should come to Mrs. *Burnaby*, by her father's death, or otherwise, should go to them for their respective lives, and after the death of the survivor, to the heirs of the body of Mrs. *Burnaby*, by him begotten.

For the eldest son, the plaintiff, it was insisted, that these articles ought to be executed for his benefit, and a settlement made on the eldest, and other sons, as in all cases of this kind had been done: but the eldest son being, under the grandfather's will, intitled to a very great estate, and the younger children of Mr. *Burnaby* having a very small, or no provision, it was insisted that the court, in this case, would so construe the articles, that the whole should go to them, or that a provision, at least, should be made for them out of this fund.

As to the point of the residue, Mr. Solicitor General insisted, that the word *residue* carried only that which would be so at the time when the will took effect, the death of the testator: for if the testator's daughter had then been of age, an immediate division might have been made of it, and the remainder men can take no more under this description than she would have done; that if this was land, it is clear, that till the contingency happened, the estate would descend to the heir, and he would have the intermediate profits; so where a particular fund is given on a future

a future contingency, the legatee cannot have it till that happens, and till then it is undisposed of, and the next of kin must take it *ex provisione legis*: For this purpose he cited the case of *Chapman versus Blisset*, before Lord Talbot, *Cajès in his time*, 145.

Where the testator devises the residue *per verba de presenti*, no future interest, which accrues after the will takes place, can be part of it, and whether it vests then, or on a contingency, is not material, for that is still the thing given.

This residue, and the profits of it, are distinct interests, and for this purpose, he cited *Nicholls versus Osborn*, 2 P. Will. 419. If a particular legacy is given on a contingency, no interest is due, but the interest shall sink into the residuum till that happens; and so held in the case of *Houghton versus Harrison*, before your Lordship, about a year ago, (*vide ante* 329.) This holds where a legacy is vested & *solvendum in futuro*, except only in the case of legacies to children, where it is allowed for maintenance, for it has not been extended to grandchildren (1).

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A residue is no other than a particular legacy of the several things which the testator dies possessed of undisposed, and is the same as if particularly mentioned, and enumerated; therefore this must follow the rule of other legacies; one legatee of this same residue can take no more by that description than another, yet, if construed otherwise, as the contingencies on which they take arise at different times, what they take will be different.

If it is undisposed, it was contended, that this being the interest from the death of *Frances*, it must be distributed to those who were the next of kin of the testator at her death, and so her next of kin be excluded from any share, because it was a contingency to arise on her death.

LORD CHANCELLOR,

This last point ought clearly to be over-ruled, for in all distributions, the time of the death vests the interest, though the equitable intestacy happens by contingency after; *Edwards and Freeman, Eq. Cus. Abr.* 249. has been cited, as a case in point, to prove this; and *Studholm versus Holgson*, before Lord Talbot, *July* 17, 1734, 3 P. Wms. 300. was cited as in point, that the interest should accumulate as part of the residue (2).

During the life of *Frances* the daughter, the profits vested in her, because the residue did so; as it was a legacy payable at a future time, and devested on the contingency, and she being a daughter, and this her portion, he decreed them to her representatives.

As to the rest of the profits which have and will accrue till the devise to the son of Mr. *Burnaby* vests, I am of opinion that

(1) *Post* 3 vol. 102. note 2.

(2) *Tiffen v. Tiffen*, 1 P. W. 500.

Nicholls v. Osborn, 2 P. W. 419. *Butler v. Butler*, *post* 3 vol. 58. *Trevanion v. Fivi-*

an, 2 Vesf. 430. *Charworth v. Hooper*, 1 Bro. Cha. Rep. 82. *Hawkins v. Coombe*, *ibid.* 335.

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the interest and profits must be considered as a part of the residue, and must accumulate.

Though not at law, yet in this court a man may die partly testate, and partly intestate; but when a whole residue is given, it is a contradiction to say any part of that estate is undisposed.

A man may die partly testate, and partly intestate in this court, though not at law: but there is a great difference between a particular distinct part of the personal estate, and the whole residue of it, for when the whole is given, it is a contradiction in terms to say any part of that estate is undisposed.

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If a personal estate is increased by any event after the testator's death, it is part of the residue, and will pass as such; and so will the interest of that residue, for that interest is assets, and part of the estate.

For whatever is claimed, is claimed as a part of his estate, and yet the whole residue of that estate is given away: the residue of a personal estate is nothing fixed, but a fluctuating interest, and if the personal estate is increased by any event after the death of the testator, it is part of the residue, and will pass as such; why then not the interest of that residue, for that interest is assets, and part of the estate; for if legacies are given payable at a future time, and at the death of the testator the assets are deficient, but by profits in the mean time accruing is become after sufficient, all the legacies will be paid, for those profits are part of the personal estate, and, if so, are part of the residue in this case (1). The only plausible argument, *e contra*, is that which is drawn from real estates.

But there are many material differences between the profits of a real, and personal estate.

For in the case of real estates the thing itself is not disposed of, but descends in the mean time, and the heir has therefore a chattel interest till the contingency happens, and carries the profits with it (2).

A material difference between the profits of a real and personal estate; rents never can become part of the personal estate; but the profits of the personal estate, are the estate itself. In the case of real estates, the thing itself is not disposed of, but descends till the contingency happens; personal estate neither descends nor goes to the next of kin, but is vested in the executor.

But personal estate does not descend, or go to the next of kin, but is vested in the executor, and this is a question only relating to the trust of it, where the intent of the testator must prevail. Another difference between them is, that in the one case the rents never could become part of the personal estate, but the profits of the personal estate are the estate itself. The testator has considered this as his personal estate after his death, by giving directions how to carry on the trade, &c. and the case of *Studholm* and *Hodgson* is in point; And therefore I do accordingly decree the profits to accumulate (3).

(1) See *Heath v. Perry*, post 3 vol. 102. n. 1.

(2) *Hayward v. Stillingfleet*, ante 1 vol. 424. note.

(3) His lordship decreed, that at the clear surplus of the testator's personal estate would belong to the plaintiff in case he should attain his age of 21 years, and that all the interest income and profits that had arisen or should arise therefrom in the mean time from the death of

Frances ought from time to time to accumulate, be added to and go along with such surplus. And in case the plaintiff should die before his age of 21 years, the said surplus together with such interest, income and profits ought to go, and belong to such person or persons as should be entitled thereto according to the contingencies in the said Will. Reg. Lib. A. 1742. fol. 309. So. *Butler v. Butler*, post 3 vol. 58. *Trevannion v. Vivian*, 2 Ves. 430.

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to the question relating to the 6000*l.* on Mr. *Burnaby's* marriage articles;

think that is a point of more difficulty, for the eldest son has a great provision, and the younger children have none.

The rule of this court, where articles of this kind are made in relation to real estates, has been to decree a strict settlement.

This is a sum of money not article'd to be laid out in land, the rules therefore do not extend to this case, for such a settlement cannot be made, it must therefore be settled as personal property.

To settle this as land, is giving the eldest son a greater interest than he would have if it was land; for in real estate, he could only have a contingency, with remainder over; here it is vested absolutely in him.

would therefore be drawing a rule in this case by analogy [477] to real estates, to defeat the intent of the parties.

In the legal construction of these articles, this money is vested in Mrs. *Burnaby* absolutely.

And if that is the legal construction, I cannot make any other answer to the intent; why should I, if the husband and wife will consent to have this settled on the younger children?

The only objection is, that by holding this to be an absolute interest in the wife, you vest it in the husband.

But this is not so here, for the limitation is to the heirs of the wife, and therefore vests in her only, and not in him.

They may compare it to the case where by settlement of lands the wife has an estate *ex provisione viri*, the court have refused to interpose to settle this estate otherwise, because the intent will prevail since she cannot alien by the statute of the 11th of Henry 7. (1).

Where by settlement the wife has an estate *ex provisione viri*, the court has refused to interpose to settle the estate otherwise.

Therefore, Mr. and Mrs. *Burnaby* consenting, the Chancellor decreed this to be settled on the younger children (2).

(1) *Vide Honor v. Honor*, 1 P. W. 123. *Malby v. Kemp*, cited 2 Vef. 358. *Moyle v. Banner*, 1 Bro. Cha. Rep.

(2) And as to the said principal sum of 6000*l.* the same by an agreement entered into before the marriage of the said defendant *Burnaby*, and his wife being agreed to be settled on the said *Burnaby* for his life, and on the said *Elizabeth* for her life, afterwards upon the heirs of the body of the said *Elizabeth* by the said *Burnaby*, by assents whereof the said sum of 6000*l.* is in law vested in the said *Elizabeth*;

and his lordship not holding it reasonable in this case, where so ample a provision is made for the eldest son of the said marriage, that a different construction should be made thereof in equity; and the said *Elizabeth* now personally desiring, that the said sum of 6000*l.* should after the deaths of her and her husband be secured and settled for the benefit of her children exclusive of such child as shall be entitled to the real estate and the residue of the personal estate of the said testator; his lordship decreed accordingly. *Reg. Lib. A.* 1742. fol. 309.

Case 293.

S. C. Am.
13 post. 603.

A creditor, on the circumstances of this case, decreed to be let in upon the estates jointly purchased by the father and his sons, and a moiety of each directed to be sold, and the money arising therefrom to be applied to the satisfaction of his judgment.

Stileman versus Ashdown & al^s, December 8, 1742.

THE bill was brought by an executor to have satisfaction out of the estate of the defendant's late father upon a judgment given by him to the plaintiff's testator, for 120*l*. The defendant, the eldest son of the conusor of the judgment, protects himself under a settlement made after the marriage of his father and mother in *May* 1694 (1), in which the father was tenant for life, the mother tenant for life, and the defendant first tenant in tail.

In 1700, the father made a small purchase jointly with the defendant of 4*l*. *per ann.* to them and their heirs.

In 1708, he made another joint purchase with his youngest son of 5*l*. *per ann.* for 105*l*. and settled it by way of provision for younger children, and paid the purchase money for both estates, and continued in possession till his death, which happened in

1735. The sons afterwards entered upon these small estates.

The plaintiff insists that all the estates are subject to his judgment for 120*l*. and that the settlement in 1694 was after marriage, and therefore voluntary.

The plaintiff having a right *prima facie*, Lord Hardwicke put it upon Mr. Attorney General to begin as counsel for the defendant.

Who insisted that the father was not indebted at the time of the settlement, that it was made in consideration of a marriage portion of two hundred and fifty pounds, and executed 37 years before the judgment, which was not confessed till 1721, and made too in pursuance of an agreement before the marriage.

But if the proof should fail us here, the portion of the wife at least will help us; and it is incumbent upon the plaintiff to show that it was not paid at the time the deed bears date.

For though there is no receipt for the two hundred and fifty pounds indorsed upon the deed, yet it is no objection, because at that time receipts upon the back were not so frequent as they are now.

Besides, this court will not give a judgment creditor a better right than he has at law, and therefore he ought to have his remedy there.

The father and the sons were joint purchasers of the several estates in 1700 and 1708, and therefore the sons were no trustees for the father, as they were capable of taking the whole

(1) Which settlement was made in the said marriage, and of 212*l*. for part performance of an agreement before marriage portion of the wife.

survived

Barrington

v

Warr

Young 276

Crabb v. Crabb

M. C. Keen. 511

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Aunt v. Day

M. C. Keen. 302

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M. C. Keen. 262

Pitcher

M. C. Keen. 262

Pitcher

hip, and upon the death of the father all his right ceased, whole vested in the sons.

ayer of the same side insisted, that in cases of voluntary its, whether the court will deem them fraudulent or not, upon the circumstances of the person at the time; here er executed it for the benefit of younger children: He case of *Duranda* versus *Cooke*, before Lord Chancellor d *Sagittary* versus *Hide*, 2 *Vern.* 44.

il depositions were read to prove the father of the de- in good circumstances in 1694, in 1700, and in 1708, s when the marriage settlement and the joint purchases de.

rown for the plaintiff,

was highly improbable that the father's only view in the s should be a provision for the children.

se with regard to the eldest son, the whole estate under ment in 1694 was secured to him, so that he was fully for: and therefore with respect to the plaintiff he can be d in no other light than a stranger would be, who had a purchase, with the father of the defendant.

s taken on the footing of a jointenancy, and therefore er as a provision for a child, because the father might a moiety, or if the son had married and even had chil- l yet had died before the father, the other moiety would ived to the father.

ese circumstances shew that it was merely a purchase for fit of the father without any view to the advancement of ren, and it would be of dangerous consequence to suffer by purchasing in jointenancy with a son, to prevent cre- m being satisfied out of such estates, upon the son's setting lit of survivorship, which did not accrue till some years debt existed.

is one great difficulty he said upon the plaintiff in this l that is to prove what the circumstances of the defen- her were twenty years before the judgment, for people e been in good circumstances, are credited a long time y are in a failing way, and therefore it is very difficult ut the precise time when the father declined in his cir- ces.

re is no other estate belonging to the father, and the covered by joint purchases, the plaintiff must lose his less these estates are liable.

CHANCELLOR,

some things this case is extremely clear.

as to the settlement in 1694, though made after mar- t being in consideration of a portion which for any thing

at the time, though made after marriage, cannot be impeached by subsequent creditors.

The settlement in 1694, being in consideration of a portion paid

that

STILEMAN V. ASHDOWN

Hide

Heard

1. *Beas*

44c

Tidmore

Sidmore

2. *Beas*

44

Beas

2 *Beas*

45

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STILMAN v. ASHDOWN.

that appears was paid at the time, I am of opinion it cannot be impeached by subsequent creditors (1).

The second question is as to the joint purchases, the first was made by the father and his eldest son on the 11th of September, 1700, and the consideration money is admitted to have been paid by the father.

The second purchase was in 1708, and made by the father and William Ashdown the youngest son, and the whole purchase money was advanced by the father.

It has been insisted on the part of the defendants, that these two purchases are to be considered, with respect to a moiety and on account of the survivorship. as an advancement of the sons, and consequently they are intitled to retain the estate, and not liable to the plaintiff's judgment.

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Though the father pays the whole consideration, yet, if the purchase is made in the name of a younger son, the heir cannot maintain it as a trust for the father.

Now as to that, the general rule has been admitted, and has been long the doctrine of this court, that notwithstanding the father pays the whole money, yet if the purchase is made in the name of a younger son, the heir of the father shall not insist it is a trust for the father (2).

But the present case differs from this rule, or any other that I remember.

In the judgment of Lord Hardwicke, the cases have gone full far enough in favour of advancements.

And if I can find any material difference, I shall in my own judgment be inclinable to relieve the creditor, for though it may be proper *stare decisis*, yet I have thought the cases have gone full far enough in favour of advancements, and that I ought not to carry it further.

The reason why a purchase in the son's name, though the possession continued in the father, has been held an advancement of the son, is, because the father was his natural guardian during his minority.

It must be admitted that in some of the cases which have been before the court, the father has continued in possession where the purchase has been made singly in the name of the son, and yet held an advancement of the son, and for this reason, because the father is the natural guardian of the sons during their minority.

A purchase in the names of father and son as jointenants, is no advancement of the son, as it does not answer the purpose, for till a division, the father has the possession of the whole, and even after it a moiety, besides the chance of the other moiety by survivorship.

Here the purchase is in the names of father and son as jointenants, now this does not answer the purpose of an advancement, for it intitles the father to the possession of the whole till a division, and to a moiety absolutely, even after a division, besides the father's taking a chance to himself of being a survivor.

(1) *Calville v. Parker*, Cro. Jac. 158. *anon. Prec. Cha.* 101. *Jones v. Marsh*, Ca. temp. Talb. 64. *Russell v. Hammond*, ante 1 vol. 13, 15. *Crown v. Jones*, ante 1 vol. 190. *Lanoy v. Athol*, ante, 444, 446. *Ward v. Shallet*, 2 Ves. 16, 18. *Hylton v. Bischoe*, 2 Ves. 308. *Wheeler v. Caryl*, Amb. 121.

(2) *Lamplugh v. Lamplugh*, 1 P. W. 112. *Grey v. Grey*, 1 Cba. Ca. 296. *Elliot v. Elliot*, 2 Cba. Ca. 231. *Mumma v. Mumma*, 2 Vern. 19. *Shales v. Shales*, 2 Freem. 252. *Bateman v. Bateman*, 2 Vern. 436. *Taylor v. Taylor*, ante 1 vol. 386. *Hill v. Ballard*, 1 Ves. 77.

the other moiety (1): nay, if the son had died during his minority, the father would have been intitled to the whole by virtue of the survivorship, and the son could not have prevented it severance, he being an infant (2).

Suppose a stronger case, that the father had taken an estate in purchase to himself for life, with remainder to his son in fee, would this prevail against the creditor? No, certainly, for the plaintiff's father having the profits for life, and the son only a remainder, the estate would have been liable (3).

STILPMAN v. ASHDOWN.

Where a father in a purchase takes an estate in it to himself for life, with remainder to his son in fee, as the father has the profits for life, the estate is liable to the creditor.

A material consideration for the plaintiff is, that the father might have other reasons for purchasing in joint-tenancy, namely, to prevent dower upon the estate, and other charges, (4).

Then consider how it stands in respect of the creditor; a father here was in possession of the whole estate, and must necessarily appear to be the visible owner of it, and the creditor would have had a right by virtue of an *elegit* to have laid hold of a moiety, so that it differs extremely from all the other cases.

[481] Here the father was in possession of the whole estate, and necessarily appeared the visible owner, so that the creditor by an *elegit* might have laid hold of a moiety, which differs it from all the other cases.

Now it is very proper that this court should let itself loose as possible, in order to relieve a creditor, and ought to be governed by particular circumstances of cases.

And what can be more favourable for the plaintiff, than that every foot of the estate is covered by these purchases; and unless it is in him upon these estates, the plaintiff has no possibility of being paid.

It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside; and therefore I shall decree the creditor in this case to be paid out of the estates jointly purchased by the father and son (5).

Not necessary a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent; for if he does it with a view to his being indebted at a future time, it is equally so, and ought to be set aside.

future time, it is equally so, and ought to be set aside.

(1) *Pole v. Pole*, 1 *Ves.* 76.

(2) *May v. Hoek*, *Har. Co. Litt.* 246. note 1.

(3) *Countess Fletcher v. Sidley*, 2 *Vern.*

1. see *Peacock v. Monk*, 1 *Ves.* 129.

The case here put by Lord Hardwicke

is either within the 13 *Eliz. c. 5.* or

(4) seems however to be within the 1

Jac. 1. c. 15. relating to bankrupts,

Fryer v. Flood, 1 *Bro. Cha. Rep.* 160.

See also *Crisp v. Pratt*, *Gro. Car.* 548.

7 *Viner*, 97. pl. 2. S. C.

(4) *Litt. f.* 45.

(5) See *Ruffell v. Hammond*, *ante* 1 vol. 15.

I think

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ASHDOWN.

I think, taking it all together, the present case comes very near the case of *Christ's Hospital* versus *Budgin et Ux'*. 2 Vern. 683. *

Lord Hardwicke ordered and decreed that the estate of the defendant's father which was in mortgage, and a moiety of the premises purchased in 1700, and also a moiety of the premises purchased in 1708, be sold, and the money arising by sale of the mortgaged premises be applied first in payment of the mortgage, and in the next place towards satisfaction of what shall be found due to the plaintiffs for principal and interest on their judgment and costs thereon, and in this court; and if that is not sufficient, then the money arising on the sale of the two moieties shall be applied towards satisfaction of what shall be remaining due to them; and his Lordship decreed that the surplus of the money arising by the sale of the premises purchased in 1700, should be paid to the defendant *John Ashdowne*, and the surplus of the money arising by sale of the premises purchased in 1708, should be paid to the defendant *William Ashdowne* (1).

* There a husband lent out money in the names of himself and his wife upon mortgages and bonds, and dies.

Lord Keeper Harcourt looked upon the wife to be in nature of a joint purchaser; and decreed she was intitled to the mortgages and bonds against the heirs at law, but admitted in case of creditors it might be fraudulent.

(1) *Reg. Lib. B. 1742. fol. 100.*

[482] *Seymour* versus *Bennet, Abbot and others*, December 15, 1742.
Case 294.

The principal registers in the prerogative office disagreeing about the appointment of a clerk, the deputy nominated *Abbot*, who for a twelvemonth officiated, and received the fees, amounting to 500*l.* Lord Hardwicke held, as he was the officer de facto, he had a right to the stated fees, and so retain them without account; and dismissed the bill as against him with costs.

THE two principal registers in the prerogative office of *Canterbury* disagreeing about the appointment of a clerk in this office; the deputy register took upon him to nominate the defendant *Abbot*, who for a twelvemonth officiated, and constantly received the fees, amounting to 500*l.* in the whole.

for a twelvemonth officiated, and received the fees, amounting to 500*l.* Lord Hardwicke held, as he was the officer de facto, he had a right to the stated fees, and so retain them without account; and dismissed the bill as against him with costs.

Cartier v. Martin
2 Dec. 579.

The plaintiff, who is one of the registers insists, that *Abbot* ought to be allowed only a small salary, as an under officer, and that he is liable to account to him, and the other principal register, for the whole profits.

LORD CHANCELLOR,

There is no foundation at all for this bill; for to be sure Mr. *Abbot*, as he is appointed to officiate in this place, is the officer de facto, and of consequence intitled to receive the stated fees, and to retain them, without account; nor is there any other person who can maintain an action for them besides himself; and therefore the bill must be dismissed, as against him, with costs.

The

The next question is, in whom the right of nomination of office of clerk to the register belongs, whether it is the right of the surviving grantees, under the grant of the late archbishop? And I am of opinion it is in the surviving grantees

SEYMOUR v.
BENNET.

Not only the pecuniary profits are declared by the grant to go to *cestuy que trusts*, but it is also declared, that they shall have nomination of the deputy, but to be approved of by the bishop, and his successors.

This office has been compared to the case of an advowson, but is only a bare presentation, where the bishop has a right to consent on lapse, and has nothing more to do but to see it filled by a proper person.

But the case of an office is extremely different, because of the labour and skill required, and the person being punishable if he does any thing fraudulent in the exercise of it, or is guilty of any act of extortion.

Upon the whole, Mr. Seymour and Mr. Bennet have the sole right of nominating the clerk; but if they cannot agree about the nomination, the court cannot help it.

[483]
The right of nomination of a clerk to the register, is in the surviving grantees, in the grant of the late archbishop Doctor Wake.

It is like the case of a presentation; if there are several *cestuy que trusts*, and they do not all agree, there can be no nomination; or, as in the case of jointenants and tenants in common, while they have a joint interest, and before severance, they must all agree, or no act can be done.

Where there are several *cestuy que trusts* of presentation, and they do not all agree, there can be no nomination. So in the case of jointenants before severance, they must all agree, or no act can be done.

It then I may do here as in a partition case, where there are several parceners of an advowson, who cannot agree in one person, the court will direct the parceners to draw lots, who shall have the presentation (2).

Where there are several parceners in an advowson, who cannot agree in one person, the court will direct them to draw lots who shall have the first presentation.

Here I will do the same, and direct the plaintiff Seymour, the defendant Bennet, to draw lots, who shall nominate first clerk to fill up the vacancy, which is made by the death of Mr. Bennet (3).

Lord Hardwicke directed the two registers to draw lots, who shall first nominate a clerk, to fill up a late vacancy.

(1) The original grant was made to several persons, who agreed, that if any of them died, his children should be entitled to a third part of the profits of the office. One of the grantees died, and the question was whether the profits of the trust under this agreement were to be divided among the surviving grantees, or to be divided among the children of the deceased grantee. The court held, that the profits were to be divided among the surviving grantees. (2) The original grant was made to several persons, who agreed, that if any of them died, his children should be entitled to a third part of the profits of the office. One of the grantees died, and the question was whether the profits of the trust under this agreement were to be divided among the surviving grantees, or to be divided among the children of the deceased grantee. The court held, that the profits were to be divided among the surviving grantees. (3) The original grant was made to several persons, who agreed, that if any of them died, his children should be entitled to a third part of the profits of the office. One of the grantees died, and the question was whether the profits of the trust under this agreement were to be divided among the surviving grantees, or to be divided among the children of the deceased grantee. The court held, that the profits were to be divided among the surviving grantees.

viving grantees: and his Lordship held that the trusts of the agreement only extended to the fees and pecuniary profits of the office.

(2) Vide *Har. Co. Litt.* 166. b. note 2.

(3) *Reg. Lib.* 1742. fol. 96.

Solomon D. Held

2 Simon M. 133

Lord Tenham versus Herbert, December 17, 1712.

The plaintiff brought his bill, in order to establish a right to an oyster fishery, and to be quieted in the possession of it, against the defendant *Herbert*, who claims the piece of ground where this fishery is, as belonging to his manor.

and to be quieted in the possession of it, as being a matter properly triable at law. *Lord Hardwicke declared, that where the right of a fishery is in dispute only between two lords of manors, they can neither come here, till it is first tried at law, and therefore allowed the demurrer.*

1715 April

The defendant demurred to this bill, as it is a matter properly triable at law.

deposition of Lord

R. Beauclerk, 270

1. 1715 April

N. S. 144

[484]

Where a man sets up an exclusive right, and the persons who controvert it are numerous, and he cannot by one action at law quiet that right, he may come here first, which is called a bill of peace, and the court will direct an issue to determine the right, as between lords

LORD CHANCELLOR,

Undoubtedly there are some cases, in which a man may, by a bill of this kind, come into this court first; and there are others where he ought first to establish his right at law.

It is certain, where a man sets up a general exclusive right and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this court first, which is called a *bill of peace*, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant (1).

as between lords of manors and their tenants, or tenants of one manor and another.

As to the case of the corporation of *York* and *Sir Lind Pilkington* (a), the plaintiffs there were in possession of the right of fishing upon the river *Ouse*, for nine miles together, and had constantly exercised that right; and as this large jurisdiction entangled them with different lords of manors, it would have been endless for the corporation to have brought actions at law.

But where a question, about a right of fishery is only between two lords of manors, *neither of them can come into this court till the right is first tried at law* (2).

(1) This point is established by the cases of *Hew v. the tenants of Bromsgrove*, 1 Vern. 22. *New Elm Hospital v. Andover*, 1 Vern. 266. *Weekes v. Slake*, 2 Vern. 301. *Arthington v. Fawkes*, 2 Vern. 356. *Brown v. Vermuden*, 1 Cha. Ca. 272. Mayor of *York v. Pilkington*, ante 1 vol. 282. *City of London v. Perkins*, 4 Bro. Par. Ca. 157.

(2) Agreeable to this distinction are the following cases, *Whitchurch v. High*, ante 391. *Welby v. the Duke of Rutland*, 6 Bro. Par. Ca. 575. *Parish of St. Luke v. Parish of St. Leonard*, 3 Bro. Cha. Rep. 40. *Weller v. Smeaton*, 1 Bro. Cha. Rep. 572.

Lord

Lord *Tenham* does not charge in this case any possession for last 38 years, so that this is in the nature of an ejectment; the plaintiff says, that this piece of ground *aquid coopertio* belongs to him; Mr. *Herbert* insists it belongs to him; so that this may very properly be determined at law, as it is a single question, to try the right between two persons; and is not like the case of the corporation of *York*, who must be gone all round the compass to have come at their right at last.

TENHAM v. HERBERT.

Therefore the demurrer must be allowed.

in *inchard* versus *Hill*, December 18, 1742, Last seal after Michaelmas term, Case 296.

Motion was made on behalf of the plaintiff for an injunction to restrain the defendant from making use of the great *Mogul* as a stamp upon his cards, to the prejudice of the plaintiff, upon a suggestion, that the plaintiff had the sole right of his stamp, having appropriated it to himself, conformable to the charter granted to the card-makers' company by King *Charles* the first (1).

The plaintiff moved for an injunction to restrain the defendant from using the *Mogul* stamp on his cards, suggesting the sole right to be in the plaintiff, having appropriated

the stamp to himself, conformable to the charter granted to the card-makers' company by King *Charles* the first. Lord *Hardwicke* denied the injunction, and said, he knew no instance of restraining one trader from making use of the same mark with another.

LORD CHANCELLOR,

I think the intention of the charter is illegal, though, indeed, the clauses that establish the corporation, and give them power to make by-laws, are legal.

In the first place, the motion is to restrain the defendant from using cards with the same mark, which the plaintiff has appropriated to himself.

And, in this respect, there is no foundation for this court to grant such an injunction.

Every particular trader has some particular mark or stamp; I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another; and think it would be of mischievous consequence to do it.

Mr. Attorney General has mentioned a case, where an action was brought by a cloth-worker, against another of the same trade, for using the same mark, and a judgment was given that the action would lie. *Popb.* 151 (2).

(1) The plaintiff alleged, that he had created the mark, and it was approved and allowed of to him by the Master, Wardens and Assistants of the Company of Stationers of playing cards of the city of

London. Reg. Lib. A. 1742. fol. 28.

(2) The case here alluded to seems to be that mentioned by *Doderidge* in *Southern v. How*, *Popb.* 144.

G g 2

But

[485]

W. B. Hill
D. B. Hill
B. B. Hill

Henry v. Smith
1 Binn. 66

BLANCHARD V.
HILL.

A cloth-worker may maintain an action against another of the same trade, for using his mark, where it is done with a fraudulent

But it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design, to put off bad cloths by this means, or to draw away customers from the other clothier: And there is no difference between a tradesman's putting up the same sign, and making use of the same mark, with another of the same trade.

design to put off bad cloths, or to draw away customers.

In the case of monopolies, the rule the court has governed itself by, is, whether there is any act of parliament under which this restriction is founded.

This court will never establish a right claimed under a charter, unless there has been an action to

But the court will never establish a right of this kind, claimed under a charter only from the crown, unless there has been an action to try the right at law.

try the right at law.

The court would not do it, even in the case of the sole printing of Bibles and Common-prayer-books, till a trial was first had (2).

If the injunction is to be obtained, it must be upon the charter of the crown.

But then it must be considered upon the intention of the charter, what was the end of directing the marks there.

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This was one of the monopolies so frequent in James the First's time, and continued through all his reign, but did not last long in his successor's.

I take this to be one of those monopolies which were so frequent in King James the First's time, and continued through all his reign, but did not last long in his successor's: I observe too, the application for this very charter was in King James the First's time, though not completed till the beginning of King Charles the First's reign.

In the first place, the design of granting this charter, was to raise a sum of money for the crown.

Here is a clause likewise for prohibiting the importation of cards from foreign parts: could such a clause be supported now? Impossible. It is intirely illegal.

There is another clause that confines the making of cards to London, and ten miles about it, which is a plain monopoly, and directly against law.

The duty here, is two shillings a gross upon cards; and the receiver intitled to one half of the duty, under the charter.

There is an authority to the card-makers, to seal their own cards; and every particular maker shall have his own stamp or mark, so that the receiver of the duty may know who is the maker of the cards.

The design of this was, that it might be plain to the receiver, who the cards belonged to, and that the receiver might be enabled yearly to make up his account relating to the duty.

(1) *Anon.* 1 Vern. 120. *Hills v. University of Oxford*, 1 Vern. 275. *If his church v. Hide*, ante 391, and reference.

Now as this was illegal, the payment of this duty has been continued long since. BLANCHARD V. HILL.

This then appears to have been the primary end of these Acts.

There is another clause in the charter, that in order every card-maker may know his cards, from another card-maker, each tradehall lodge his mark or stamp with the receiver, *to prevent any fraud upon our loving subjects.*

This is a colourable end, but if any weight was to be laid upon the colourable recitals, it would be establishing every other monopoly.

For all the world knows, that there is a pompous recital in every monopoly, of the great benefit to trade, accruing from such restraints of restriction.

There is another thing observable too, that it is impossible to carry this clause into execution; for the duty being illegal, and the receiver sunk with it, so that there is no person to receive the stamps or marks.

An objection has been made, that the defendant, in using this mark, prejudices the plaintiff by taking away his customers.

But there is no more weight in this, than there would be in an objection to one innkeeper, setting up the same sign with another.

[487]
The objection of the defendant's taking away the plaintiff's customers by using the same mark, is of no more weight than to one innkeeper's setting up the same sign with another.

There is a fact set out by the defendant in his answer, which is not at all denied by the plaintiff, that the card-makers use quite different marks from what they did formerly; which shews this charter is grown obsolete, or otherwise all card-makers, if they observed the charter, would adhere to that sort of stamps which directed under it.

Upon the whole, there are no grounds in this case to grant an injunction against the defendant, till the hearing of the cause (1).

(1) *Reg. Lib. A. 1742. fol. 34.*

Bennet versus Lee, December 20, 1742.

Petition had been presented on behalf of *Francis Lee*, heir at law to Sir *Francis Lee*, grandfather of Sir *John Lee*, a bill of review upon a suggestion of new evidence discovered since the decree, in the former cause, and which was not in his power at the time of the decree, and this was supported by affidavits.

There should be a decree against him on the second hearing, he may with as much reason put in an answer, which would occasion infinite vexation.

The material evidence that is insisted upon is a deed of settlement in 1684, made by the father of Sir *John Lee*, in which he uses under that settlement are spent, and the reversion in

Case 297.

S. C. ante 324. post. 529.
Lord Hardwicke doubted whether an infant can, before he comes of age, put in a new answer, so as to rehear the cause over again;

BENNET V.
LEX.

fee is descended upon *Francis Lee* and his brother *Richard Lee*, who is an infant, in gavelkind.

It was argued on the part of *Richard Lee*, that he, being an infant, cannot be precluded by the decree, from varying his defence in the former cause even before he comes of age.

LORD CHANCELLOR,

The doubt with me is, whether an infant can, before he comes of age, put in a new answer, so as to rehear the cause all over again; for if there should be a decree against him upon the second hearing, he may with as much reason put in a third answer, and make the proceedings endless, and by this means leave it in the power of a guardian to put in a new answer for him every year, during his minority, and occasion infinite vexation*.

On the side of the plaintiff *Bennet* they set up three recoveries in 1703, 1718, and 1736, which, if they take in the *Kentish* estate claimed by the defendants, is a complete bar to the petition.

Some objections being made to the validity of these recoveries, the cause was ordered to stand over, that the petitioners may have time to look into them.

*N.B. In the case of *Richmond & Ux* versus *Taylor*, 1 P. Wms. 735. it was held that an infant aggrieved by a decree is not bound to stay till he is of age, but may apply as soon as he thinks fit to reverse it: and may do this either by bill of review, rehearing, or original bill, alledging specially the errors in the former decree.

Case 298.

Baker versus *Hart*, December 22, 1742.

The parties interested in an order for the appointment of a receiver, take upon them to print it

THERE was an order made just before the last long vacation, for the appointing a receiver of the rents of an estate in the island of *Sheppy*, belonging to the late admiral *Hofser*.

with a recital of the material facts in the cause relevant to the order, and disperse it among the tenants: some other parties insisted this was a contempt of the court. Lord *Hardwicke* held it to be no contempt, but said at the same time he did not approve of such a practice.

It being necessary for the Master to inquire into the circumstances of the person proposed for a receiver, and likewise of his sureties, it was impossible to complete it before the long vacation, so that the parties interested in this affair were apprehensive that the tenants would pay their rent into an improper hand, and therefore, upon consultation with the Master how they might prevent this inconvenience, he advised them to print the order with the recitals of the most material facts in the cause, relevant to the order, and to disperse it among the tenants, which was done accordingly.

Some other parties in the cause apply now by petition to the court, insisting that the printing this order was a contempt of this court, and especially the recital part of it, which, as it is single and detached from the rest of the cause, may look in the eye of the world as a reflection upon the persons named in them (1).

(1) This part of the case is not clearly stated in the Register's book. Reg. Lib. A. 1742. fol. 151.

LORD CHANCELLOR,

I am very far from approving of the method which has been taken of printing this order, but will always discountenance such practice whenever I meet with it.

As to this particular case, it is not at all alike the case of *Hugson*, the printer of the *Champion* (1), because there he did not *ratum* print the proceedings in the cause, between the executors of Major *Roach* and his widow, but by way of narrative upon him to abuse some persons, who had made affidavits the cause, and likewise the executors, and therefore extremely ferent from the present case; for here does not appear the intention of reflecting upon the persons named in the printed order, but done merely by the advice of the Master, to prevent the tenants from paying the rent improperly, and to impose it in their hands, till there should be a person appointed the Master to receive it.

I could wish that the orders of this court were framed with the same simplicity as orders made by the courts of common law; and to be sure in a great many instances they might; but in the special orders, the recitals of the principal facts which induced the court to make these orders, are necessarily inserted, and as the drawing orders in Chancery have been for a long time practised in this manner, I will not take upon me to alter the course of them.

as orders made by the courts of

As the manner of drawing orders here is of long standing, Lord Hardwicke said he would not alter the course of them, but wished they were framed with the same simplicity of common law.

As to the complaint itself in the present case, I am of opinion on the particular circumstances, and plain intention of doing that though it is not a practice I approve of, yet it was innocently done, and consequently was no contempt of this court; and as to this part of the petition, his Lordship ordered the same be dismissed.

(1) S. C. ante 469.

Davy versus Barber, January 15, 1742.

Case 299.

IR *George Carey* and Mr. *William Carey* had several estates in the West of *England*, which were very much incumbered; the death of Sir *George*, his estate descended to *William*; *William* died, and Mr. *Barber* married his heir at law, who by that means became intitled to both these estates, and had likewise a considerable mortgage upon them which was prior to any of the incumbrances.

In 1727, three bills were brought by Mr. *Davy* and others, who were creditors of Sir *George* and of *William*, against *Barber*, in order to have a satisfaction out of these estates.

Under a decree for sale of these estates, Mr. *Phillips* bid 8020*l.* in 1730 was confirmed the best purchaser at that sum.

Where a purchaser has an advantage by the dropping in of lives, the court will direct an inquiry what interest was proper to be paid by him on that account (1).

Barber
Chancery
1742
3007.4

(1) Vide *Ex parte Manning*, 2 P. W. 410. *Blount v. Blount*, post. 3 vol. 636.

DAVY v.
BARBER.

20 g. h.
10 g. s. d.
30. v. Barber. 43.

Mr. *Phillips* was desirous of being let into possession in pursuance of his purchase, but Mr. *Barber* has continued in possession to this time as mortgagee, and it was but lately that his mortgage was satisfied.

By reason of this delay several lifehold estates are dropped in, and by that means the estates which Mr. *Phillips* bought are now worth 2000*l.* more than they were at the time he was confirmed the best purchaser.

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Mr. *Phillips* petitions to be let into possession, and Mr. *Barber* and the creditors pray that the bidding may be opened.

Mr. *Phillips* and Mr. *Barber* came to an agreement in court, that Mr. *Phillips* should pay Mr. *Barber* 1300*l.* more than the purchase money, and in consideration thereof Mr. *Phillips* should be let into possession.

LORD CHANCELLOR (1),

I am opinion that the proper direction will be, that the 1300*l.* be added to the sum of 8126*l.* which Mr. *Phillips* in the name of Mr. *Hamlyn* had before bid for the estates in question, and that Mr. *Barber*'s mortgage be paid in the first place, and thereupon he must assign his mortgage to trustees, to be approved of by the Master, in trust to attend the inheritance purchased by Mr. *Hamlyn*; that such deeds as relate to other estates as well as the purchased estates ought to be lodged in the hands of the Master for the benefit of all parties, subject to further order, and Mr. *Hamlyn* to be at liberty to take copies of them, and the residue of the money to be placed out in the bank, to the credit of the accountant general, and thereupon Mr. *Hamlyn* to be let into possession.

The dropping in of lives on estates in the West of England, is considered not as accidental, but as annual profits.

In the West of England estates are constantly let out upon lives, and small conventional rents reserved, but the chief profits arise from the dropping in of lives, which is not considered as accidental, but as part of the annual profits of the estate.

From 1730, when the report was absolutely confirmed, neither Mr. *Hamlyn* nor Mr. *Phillips* have been let into possession, but have been obstructed by Mr. *Barber*, who seems to have had some grounds for it on account of a large mortgage on these estates prior to any body, and it was but reasonable that he should be satisfied; however, the estate is worth a great deal more by the dropping in of lives than it was at the time the Master's report was confirmed.

The question then is, who is to have this advantage, or what recompence is to be made for it?

(1) "His Lordship by consent of the petitioners Barber and Hamlyn, both presented in court, doth order, that the sum of 1300*l.* be added to the said sum of 8126*l.* being the purchase money, at which *Phillips* and *Hamlyn* were reported best purchasers." *Rep. Lib.*

A. 1742. fol. 247. It seems, that bid- dings may be opened on special circumstances after the Master's report is confirmed absolutely. Vide *Watson v. Birch*, 4 *Bro. Cha. Rep.* 172. and the cases there cited.

Now

Now as to that, when purchases of this nature are made under private contracts between particular persons, there is no great difficulty in the matter, for then a time is generally fixed for payment of the purchase money, and if the purchaser does not pay the money, then he will be chargeable with interest; and he must bear any loss which happens in the estate (1), so likewise will he be intitled to any profits which arise from it; besides it is in the breast of the court whether they will decree the contract to be specifically carried into execution, when any extraordinary advantage arises by an accident of this nature: and in other kinds of cases the court has considered biddings a good deal under their discretion, so that if they think proper they may leave the party to his remedy at law.

But the present case is of a different nature, being a bidding under a decree of this court, and upon which this court must finally make a determination.

The purchaser here has plainly a considerable advantage by the dropping in of lives, and had it not been for the agreement now made between Mr. Barber and Mr. Hamlyn, I should have declined to direct an inquiry what interest was proper to be paid to the purchaser; for if the court was not to give such direction, there would be a manifest injustice.

But in consideration of Mr. Hamlyn's agreeing in court to pay 100*l.* more, I do think he is intitled to the advantage arising from the dropping in of lives.

DAVY V.
BARBER.

If the purchaser under a private contract does not pay the purchase money at the time fixed, he will be chargeable with interest; as he must bear any loss, so likewise will he be intitled to any profits that arise from the estate.

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(1) *White v. Nutt*, 1 P. Wms. 61.

Spinks versus *Robins and Cope*; and by a Cross Bill *Robins* versus *Spinks, Trent and others*, January 27, 1742. Case 300.

THE original bill was brought by the plaintiff as a residuary legatee of the late Mr. *Spinks* to have it placed out to his benefit by the defendants the executors of the will, and as merely of course; but the material question arose on the cross bill, and upon this case.

whole to the survivor; each of the legacies directed to remain in the executor's hands till legatees in 21. S. afterwards entered into two bonds, one to *Mary*, and another to *Sarah*, reciting he was bound to provide for their maintenance; each of the bonds were in the penalty of 4000*l.* for securing 10*l.* provided they marry in his life-time with his consent, or in case they survive him. As the principal sums given by the bonds are upon two contingencies, they ought not to be considered as a satisfaction to the legacies under the codicil (1).

S. by a codicil without any date gives 1000*l.* a-piece to *Mary* and *Sarah Robins*, and if either die before their legacies are paid,

Mr. *Spinks* the testator by a codicil without any date gives 100*l.* a-piece to the plaintiffs *Mary* and *Sarah Robins* (the daughters of Mrs. *Robins* a widow, with whom he lived for several years till the time of his death), and if either of them should die before their legacies were paid, then he gave the

Barber
Hamlyn
Spinks 547

(1) As to the doctrine of Satisfaction, See *Bellasis v. Uthwatt*, ante 1 vol. 426. &c.

SPINKS v.
ROBINS.*Wharton**and Buchanan*
li. d. N. 4/2

[492]

A legacy to a daughter under the will of her father, held to be satisfied by his giving her a marriage portion afterwards. (1).

whole to the survivor, and directed that each of the said two legacies should remain in the hands of his executors, till they attained the age of 21.

He afterwards enters into two bonds, one to *Mary* and the other to *Sarah Robins*, reciting that for divers good causes and considerations he is desirous to make a provision for and towards their maintenance.

Each of the bonds were in the penalty of 4000*l.* for securing 2000*l.* a-piece to them, provided they should marry in his life-time, with his consent, or in case they should survive him.

Mr. Attorney General, counsel for the defendants, in the cross cause insisted, that the bonds are to be considered as given in satisfaction of the legacies under the codicil.

And for this purpose, cited *Tapper versus Chalcraft*, 11 Feb. 1739, before Lord Hardwicke; where it was held, that a legacy to a daughter, under the will of her father, was satisfied by his giving her a marriage portion afterwards: he cited likewise *Harlop versus Whitmore*, 1 P. Wms. 681. and *Jenkins versus Powell*, 2 Vern. 115. *Webb and Webb*, Vent. 347.

Mr. Chute, for the plaintiffs the *Robins's*, cited *Atkinson versus Webb*, 2 Vern. 478. and insisted that the words for and towards the maintenance in the bond, *ex vi termini* imply, that it is not the whole he intended to give them, and therefore the 1000*l.* under the codicil may be considered as an additional portion.

LORD CHANCELLOR,

The general rule which has been laid down in the cases is, where the portion has been actually paid (2).

But I do not remember any case that comes up to the present, where the principal sum is given upon two contingencies, one of marrying with consent in his life-time, and the other in case they should survive him, so that it might never take effect, for they might marry without his consent, or die before twenty-one.

The cases that have been cited to me have been of portions from parents to children: there the presumption is, that the parent is paying the debt of nature.

I will not say, but there may have been cases also between collateral relations, as between uncle and niece, standing in *loco parentis* (3): but I do not remember in any case between strangers, where a man first gives a legacy by will, and afterward in his life-time, a different sum to the same person by bond, that the one has been held to be in satisfaction of the other; for to extinguish a legacy by such a construction, would be a very extraordinary stretch of this court.

The words by which the legacies are given in this will are not at all in the terms of a *portion*, neither is the word *portion* so much as mentioned.

(1) See *Bellasis v. Uthwatt*, ante *Sewell*, post. 3 vol. 96. 1 vol. 426. note.

(2) *Chapman v. Salt*, 2 Fern. 646. *Powell v. Claver*, 2 Bro. Cha. Rep. 500. *Hale v. Allon*, 2 Cha. Rep. 35. *Clark v.*

(3) *Shudall v. Jekyll*, post. 518.

SPINKS v.
ROBINS.

What weighs with me very strongly is, that the money given the bond, is upon a contingency, and therefore absolutely certain, whether one shilling of the principal sum will become due or not.

Now, in the construction upon double portions, it has always been of weight, that they were both certain.

Formerly, the circumstance of time when the portion was to be paid had some weight in determinations, but, latterly, it has been laid out of the case (1).

Here, it would be extremely unjust; for if either of these widewomen had married in the life time of Mr. Spinks, without assent, it would have been a forfeiture of the bond.

Mr. Attorney General says, that it was contingent, but when the event takes place, it is certain.

Now, a case may be put, which will clear the present case from Mr. Attorney's objection.

For, suppose a man gives a legacy to another, to whom he is indebted, this is a satisfaction, if it is equal, or exceeds the debt: but where a legacy is given upon a contingency, it has never been held to be a satisfaction; for in these cases, it must be so at the time, and not uncertain whether the legacy will take effect or not.

A legacy left to a creditor is a satisfaction, if it is equal, or exceeds the debt; otherwise, if given upon a contingency.

This case is within the same reasoning, and ought to be determined accordingly.

Lord Hardwicke declared, therefore, that the 2000*l.* and interest at the rate of 4 *per cent.* due upon the bond entered to by the testator to Mary Robins, now married to Robert Trent; and also the legacy of 1000*l.* given by the codicil of Mr. Spinks to Mary Robins, with the interest thereof, are subject to the trusts in the articles entered into by Mary Robins with Robert Trent, and decreed that the articles be performed; and that what shall be found due for the interest of the two sums of 1000*l.* and 2000*l.* before the marriage, be paid to Robert Trent, the husband; and what shall be found due for the arrears and growing payments of the interest of the 1000*l.* from the time of the marriage, to be paid to Mary, the wife, for her separate use, according to the articles; and that what shall be found due for the arrears and growing payments of the interest of the 2000*l.* from the time of the marriage until a settlement shall be made, be also paid to Mary, for her separate use (2).

(1) *Jesson v. Jesson*, 2 Vern. 255. *Warren*, 1 Bro. Cha. Rep. 310.
Thomas v. Keymish, 2 Vern. 349. *Clark* (2) *Reg. Lib. B.* 1742. fol. 199.
Sewel, post. 3 vol. 98. *Warren v.*

Case 301.

Mellor versus Lees, February 5, 1742. Rehearings.

THIS case came before the Chancellor upon an appeal from the *Rolls*.

The plaintiff's grandfather, in 1689, mortgaged the estate in question to the *Whiteheads*, they afterwards mortgaged it to *Cartwright* and *Heywood*, and their heirs, for 200*l.* who, to secure the interest, leased the estate to the plaintiff's father, in *June* 1689, and to his assigns, for 5000

A mortgage was made of an estate by the plaintiff's grandfather, *Thomas Mellor*, in 1689, to *John* and *James Whitehead*, the *Whiteheads* afterwards, on the 5th of *June*, 1689, mortgaged the same estate to *Cartwright* and *John Heywood*, and their heirs, for securing 200*l.* to which *Thomas* and his son *John Mellor* were parties; and *Cartwright* and *Heywood*, in order to secure to themselves the interest, made a lease to the plaintiff's father, *John Mellor*, dated the 12th of *June*, 1689, and to his assigns, for 5000 years, at the rent of twelve pounds a year, for the three first years, and ten pounds a year for the remainder of the term; and if in the space of three years, the 200*l.* was paid, and the interest, then the premises were to be re-conveyed.

years, at 12*l.* a year rent for the three first years, and 10*l.* a year rent for the remainder of the term; and if at three years end, the 200*l.* was paid, and interest, then the premises were to be reconveyed: Receipts given, sometimes for interest, and sometimes for a rent charge, the last in 1730, the 200*l.* lent was charity-money, directed to be laid out in the purchase of lands in fee, and the rents to be applied for clothing 24 needy housekeepers. In 1738, the plaintiff gave notice he would pay in the money, but the defendant refused to take it, and insisted it was an absolute purchase, and so decreed by the Master of the *Rolls*; and on appeal, Lord *Hardwicke*, being of the same opinion, affirmed the decree.

James Thomas
Receipts 500

Receipts have been given since, sometimes for interest, and sometimes for a rent-charge; the last receipt was in 1730.

William Sutton
9. *Sutton*
30*l.*

The 200*l.* lent, was money left under one *Sutton's* will in 1687, and directed to be laid out in the purchase of lands in fee in *Lancashire*, or *Cheshire*, and the rents of it, when purchased, to be applied towards cloathing 24 aged and needy housekeepers.

Henry
Readings
Beaumont
12*l.*

The plaintiff, the 20th of *January*, 1738, gave notice that he would pay in the money, but the defendant, a new trustee of the charity, refused to take it, and insisted upon it as an absolute purchase: and was so decreed by the Master of the *Rolls*, *William Fortescue*, Esquire.

Lord v. Atley
Publ. 422
Thomas v. Dean
Callaghan v. The
3. 15 [495]

The estate, at the time of the mortgage, was worth 500*l.* only, but would sell now for 900*l.*

LORD CHANCELLOR,

To be sure, the rules of this court relating to mortgages ought to be adhered to, that borrowers of money may not be oppressed.

There are two general questions in the present case.

First, As to the contract, Whether it is a transaction that is in its nature a mortgage, or a defeasible purchase, and subject to a repurchase?

Secondly, If originally intended as a mortgage, Whether length of time will not be a bar to redeeming?

As to the *first*, There is a difference between such an agreement as this, which relates to a rent-charge issuing out of land, and an agreement which relates to the land it self.

So

So likewise the case of creating a rent-charge out of lands, and mortgaging a rent-charge, is of different considerations.

MELIOR V.
LEES.

Where a man takes a mortgage, it is not barely adequate to the payment of the interest, or even to a perpetual payment of the interest, but generally the estate is double the value of the principal money lent.

If, indeed, any fetters had been laid upon redeeming the mortgaged estate, by some original agreement, either in the mortgage deed, or a separate deed, it would not avail, where it is one with a design to wrest the estate fraudulently out of the hands of the mortgagor.

Where a mortgagee by agreement, either in the mortgage deed, or a separate one, fetters the redemption, with a fraudulent design to get the estate, it will not avail.

But where is the fraud, or the inconvenience, in the present case? The land itself is not parted with, but it is merely selling rent-charge, strictly adequate to the consideration given, the 200*l.* and instead of having a chance for the whole estate, the lender of the money is contented to buy the interest for ever, by way of rent-charge.

I have said thus much in general; and now I come to the particular circumstances in this case.

From the agreement, and from the articles themselves in 1689, appears plainly to be the intention of the parties, that after the end of the three years the interest should be changed into a rent-charge, and be irredeemable.

The objection is, that the court will not permit a clause in the mortgage deed, or in another, which shall fetter the redemption; and this observation is very right, when applied to the case of a common mortgage.

But what has been said by the defendant's counsel, with regard to the charity, is very material, (not that I will lay down a general rule, with regard to all charity money lent on mortgage,) for here a sum of 200*l.* is left by one *Sutton*, which is not to be laid out at interest, but to be invested in land in fee-simple, so that the trustees of this charity, being under inability of treating in the common way, have put it in this method, and it is the will itself that has laid a foundation for inflicting it in this manner, and has delivered the defendants from the suggestion of oppression and imposition.

It is material, in the present case, that here is no covenant in the deed, for the repayment of the mortgage money, which shews plain intention of purchasing a rent-charge.

In common mortgages, the want of a covenant for repayment of the

mortgage money is no bar to a redemption.

In general, indeed, this is no rule against redemptions in common and ordinary cases, though there is no such covenant; but here it is explanatory of the whole scheme, and intention of the parties.

(1) *King v. King*, 3 *P. W.* 360. ante 3 vol. 280. *Contra. Pre. Chan.* 423. 5. note. *Lawley v. Hooper*, post.

MELLER V.
LEES.

The agreement is to take a rent-charge, at the rate only of 5 per cent. which was extremely fair, considering the interest of money kept up long after at 6 per cent.

Floyer and Lavington 1 P. Wms. 268. is the only case that comes near the present. *Bonham versus Newcomb*, 2 Vent. 364. went upon a different reason, and is an exception out of the general rule*.

I do not singly found my opinion upon the nature of the contract in the principal case, but on the great length of time, for this bill is brought at the distance of 48 years.

Where a mortgagee has been in perception of the rents and profits for a considerable time, the court will not decree a redemption, as it would be making him a bailiff to the mortgagor.

And though it is very true, that the court will not suffer a common and plain mortgage to be redeemed, where the mortgagee has been in perception of the rents and profits for a considerable time (1), because it would be making the mortgagee bailiff (2) to the mortgagor, and subject to an account; yet, in this case of a rent-charge, there would be no such inconvenience, for the person might easily account.

*But consider how much the value of money is altered since 1689, and likewise the value of the rent-charge.

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For if the purchaser was to reconvey his rent-charge now in 1742, he could not possibly purchase another with the 200*l.* that would produce more than 7*l.* a year; therefore if the person who had a right to redeem had come sooner, something more might have been said.

There is still another reason, that it would make property precarious; for if after the three years it became an absolute estate, then it is a freehold, and would be conveyed as such (3); if considered as a redeemable interest, then it is only personal estate (4), this would create great confusion, and render it very difficult for persons either to dispose of their property, or to settle what kind of conveyance is proper.

Therefore, this bill has been properly dismissed at the Rolls, not so much upon general rules, as upon the particular circumstances of the case, and upon the likeness there is between this and the case of *Floyer versus Lavington*.

His Lordship affirmed the decree, but gave no costs on either side (5).

* One for 800*l.* consideration, grants a rent-charge of 48*l.* a year, in fee, upon condition, that if the grantor, during his life, shall give notice, and pay in the 800*l.* by instalments, viz. 100*l.* at the end of every six months, and shall do this during his own life-time, then the grant to be void; the mortgage was made about sixty years since, when the legal interest of money was 8 per cent: Lord Chancellor Cowper was of opinion, the rent-charge was not redeemable, and decreed the bill for a redemption should be dismissed. *Floyer versus Lavington*, 1 P. Wms. 268.

(1) *Aggas v. Pickeril*, post. 225.

(2) *Vide ante* 363.

(3) *Vide* 1 Vesf. 403, 404.

(4) *Vide Har. Co. Litt.* 208. b. note 1.

(5) As the bill was dismissed at the Rolls (*Reg. Lig. B.* 1741. fol. 215.) and that decree affirmed upon the rehearing, the state of the case does not appear in *Reg. Lib.* 1742. fol. 167.

Attorney General versus Sawtell, February 8, 1742.

Cafe 302.

THE question was, Whether copyhold lands surrendered by Sir *J. T.* devised by Sir *John Taff*, to the use of his will, and devised by him in charity, would pass, as the testator had not signed the last sheet, is there any witness to it.

consisted of eleven sheets, the two first of which he signed, and died before he signed the rest, nor were any witnesses. Lord Hardwicke held it to be a good appointment of the copyhold estate for the under the stat. of 43 Eliz. (1).

Drivener had orders to ingross it, but the testator being in his, the rough draft, consisting of eleven sheets, was sent to him, and he signed only the two first, but died before he could sign the rest.

It was proved in the cause, that the testator asked, before he signed the will, whether it was according to his directions, and the Drivener assured him it was.

In support of the will, was cited *Wagstaff versus Wagstaff*, Vms. 258.

The Chancellor, though the will was not signed in the last sheet, and without witnesses, held it to be a good appointment of the copyhold estate for the charity, according to the statute of 43 Eliz. c. 4. of *Charitable Uses*. [498]

(1) *Taffel v. Page*, ante 37. *Attorney General v. Andrews*, 1 Ves. 225.

Dr. Trebec versus Keith, February 12, 1742.

Cafe 203.

Dr. *Keith*, minister of *May-fair* chapel, which was a chapel of ease to Saint *George's* parish, *Hanover-Square*, of which Dr. *Keith* is the rector, being cited into the bishop of *London's* court for officiating as a clergyman of the church of *England*, and being licensed by the bishop, and having been denounced and excommunicated forty days, for contumacy and contempt of ecclesiastical laws; upon the bishop's certificate into the court of this fact, the writ of *significavit* issued; and at a return thereon it was moved to quash the writ, upon the following reasons.

1st, That the particular cause of the excommunication is not stated.

2^{dly}, No particulars are mentioned in what manner *Keith* was excommunicated, or performed divine service.

3^{dly}, That it is not said, that he has performed divine service since the monition.

4^{thly}, It is not said, that at the time of the excommunication he officiated within the diocese of *London*.

Lord Hardwicke over-ruled all the exceptions, upon a motion to quash the writ of *significavit*, and held there was sufficient to warrant the court to issue the excommunication *ex pando* (1).

The B. Prins.
1. (Prins. 1)
(3)

Dr. B. v. Prins.
8. B. B. 64

(1) Vide *Ex parte Little*, post. 3 vol. 479.

Fifthly,

THREE V.
KEITH.

Fifthly, It is not said, by what person, or in what manner, the excommunication was pronounced.

Sixthly, That it does not appear when the excommunication was pronounced.

Last exception was, That Mr. *Keith* is within the toleration act.

The defendant having obtained an order *nisi*, the plaintiff's counsel this day shewed cause, why the writ should not be quashed.

In support of it was cited, *The King versus Bunard*, 1 P. Wms. 435.

And for the exceptions, *The King versus Fowler*, Salk. 293, and *The Queen versus Hill*, Salk. 294. and 8 Co. 68. *John Trollop's case*.

LORD CHANCELLOR,

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This is a case of as great consequence to the good government and discipline of the church as can possibly happen.

I can take notice of nothing but what appears upon THE SIGNIFICAVIT; and the question before me is, Whether there is sufficient to warrant the court to issue the writ of *excommunicato capiendo*.

Now, if this gentleman is out of the jurisdiction, he is not without remedy, for he may go to a court of common law after sentence, as well as before.

The first, and material exception is, That the particular cause of the excommunication ought to be set forth.

It is not necessary for the ecclesiastical court to shew they have rightly proceeded, for if they have not, you have a remedy by appealing to a higher ecclesiastical jurisdiction.

Here is certainly a description of the principal cause, and if some of the matters mentioned are within the jurisdiction, it is sufficient.

It is not like the case of the *King* and *Fowler*, which was held uncertain, as it was in the disjunctive, *Tithes or other ecclesiastical dues*, so that it might be ecclesiastical dues only; if it had been tithes and other ecclesiastical dues, it would have been well enough.

As to preaching, there is no pretence for his doing it without licence from the bishop; the same as to the administering of the sacrament, and celebration of marriage; for the canons of 1603, confirmed by act of parliament, are express as to that matter.

Here the ground of the contumacy is described specially, which is more than is necessary, for where the cause is sufficient, it may be set forth generally.

The second exception, That it is not mentioned in what manner *Keith* officiated, or performed divine service, and therefore it might be in his own house, or a private chapel.

But the word *officiating* ought not to be so construed; for reading prayers, or a sermon, in a private family, is not performing divine service.

Divine service is the expression made use of in several acts of parliament, particularly in the act of uniformity, 13 & 14 Car. 2.
cap. 4.

4. *sect. 27.* relating to the service in *Welfb*: In several other acts of parliaments, that direct the reading of proclamations, the effect is, that it be read after divine service.

The word *officiate* relates to his office as a presbyter, which it means his doing it in a publick manner.

It is not indeed necessary for a minister to have a licence from the bishop of the diocese for every particular case, but yet the court may suspend him wholly where he is irregular, till he consents to perform his duty properly: And it is not here a deprivation of the cause; but of the contempt only, for which he was excommunicated him.

The fourth exception, That it is not said, at the time of the excommunication, he officiated within the diocese of *London*, and therefore has been cited out of the diocese, contrary to the statute of 23 H. 8. c. 9.

It is not averred, indeed, that he was resident in the diocese at the time of the excommunication pronounced, but being

in the libel to be within the diocese, I will not presume that he was not commorant when the monition issued; and to this it, the case in 1 P. Wms. 435. was properly cited.

There is another answer to this objection; that a man may be resident in one diocese, and come into another and commit an offence charged upon him in the *significavit*, and this, for the purpose of being cited, is a residence sufficient, and he may be prosecuted in the diocese where he committed the offence, unless he was so considered, there would be no remedy.

Doctor Blackmore's case, in Hard. Rep. 421. Pl. 8. Trin. 1712.

The fifth exception, That he is not said to be a person in holy orders who pronounced the sentence of excommunication.

The averment in the *significavit* is sufficient, for the words are, a person lawfully authorized, which takes in the capacity of the person doing it.

Sixth exception, That it does not appear when the excommunication was pronounced.

Now the *significavit* only avers, that he continued contumacious, but the *terminus a quo*, and the *terminus ad quem*, is never forth.

The last exception was, that Mr. *Keith* is within the toleration act, the 1st of W. & M. c. 18.

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The act of toleration was made to protect persons of tender consciences, and to exempt them from penalties; but to extend to clergymen of the church of *England*, who act contrary to the laws and discipline of the church, would introduce the utmost confusion.

Lord Chancellor declared, that all the exceptions must be overruled.

Case 304. *Lingood versus Eade, January 15, 1742 (1). Pleas and Demurrers.*

S. C. ante 395.

A plea to a bill brought to set aside an award, and for a general account, Lord Hardwicke allowed it as against the general account, but held that the plaintiff was not precluded at the hearing from objecting to the award for fraud or partiality in the arbitrators.

THE plaintiff preferred his petition on the 26th of March last, to set aside the award in the matter between him and *Eade*, which was dismissed, but without prejudice to his bringing a bill for the like purpose; he brought a bill accordingly against the arbitrators and *Eade*, and prays by it that he may have an inspection of all the accounts from which the arbitrators framed their award, and that it may be set aside, and that the defendant *Eade* may account generally for all transactions during his partnership with the plaintiff.



The defendant *Eade* pleads, that in former causes between him and the plaintiff in this court, an order was made the 18th of November 1740, at the request, and by the consent of the parties, that all matters in difference between them relating to their joint dealings, or otherwise, should be referred to *Charlton, &c.* and the award to be made on the 1st of May then next; and by a subsequent order of court, with the consent of the plaintiff's counsel, the time for making the award was enlarged till the 1st of November, and by a third order till the 1st of February; that the arbitrators met forty-five times and upwards (the plaintiff and defendant being present at the greatest part of the meetings), and having fully heard and examined the plaintiff and the defendant and their several witnesses, made their award within the time limited; and among other things declared that they had taken an account of the outstanding debts due to, or owing by or from the complainant, and the defendant, or either of them, on account of their joint dealings, and they awarded that each should pay and discharge one equal moiety of the several debts therein mentioned, (that is to say) to *Samuel Torin* 92*l.* 10*s.* 9*d.* to *Slingsby Betbel* 82*l.* 18*s.* 2*d.* and to *John Hide* 15*l.* which the said arbitrators found to be then remaining due from the complainant and defendant, or one of them, on their joint accounts, be the same more or less than as above-mentioned.

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“ That the arbitrators have set forth, in a schedule to their award, an account of sundry debts and effects owing to the partnership, amounting to 5094*l.* 14*s.* 2*d.* which debts and securities they awarded to belong in moieties to the plaintiff and the defendant; and for the better getting in the same, the arbitrators did thereby recommend it to the defendant and the complainant to consent that an order might be made by this court, for the appointing a proper person conversant in mercantile affairs, to collect in the same for their joint use, and in case either of the parties should refuse to consent thereto, the arbitrators did make it their business

request, to this court, to order the same, as the most probable means to prevent future litigations between the said parties.

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That the arbitrators did award and declare, that, exclusive of the above matters, there was then due from the plaintiff to the defendant 9194*l.* 19*s.* 6*d.* on a just balance, which they awarded to be paid by the plaintiff to the defendant by instalments of 2000*l.* on each payment, with interest at 4 per cent. from the 2d of the same *February*.

That lastly they did award, that upon payment of the said 9194*l.* 19*s.* 6*d.* by the plaintiff, his executors, &c. to the defendant, his executors, &c. they the said plaintiff and is defendant, their respective executors and administrators, should mutually execute and deliver to each other respectively good and sufficient release and discharge (the form whereof had been previously settled by one of the Masters of this court, in case this court should be pleased to give directions for the settling thereof), whereby the said parties should respectively release to each other, all matters in difference between them, relating to their joint dealings, &c.

The defendant for plea further saith, that all the said particulars so awarded are fair and just; all which matters and things the defendant pleads in bar to the plaintiff's bill, and submits to the court whether he is obliged to make any further answer."

Mr. Murray, counsel for the plaintiff, confined himself to the objections against the award, because he said the plea of the award must fall to the ground, if the award itself is not good.

An award must be the judgment of the arbitrators, and final; it has been held to be a bad award, where the arbitrators said that costs should be paid according to taxation.

The first objection he took was, that here the arbitrators awarded, that the debts due from the partnership should be paid in instalments, by *Lingood* and *Eade*, and then mentions only three instalments, so that in this respect it is not final.

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The second objection, that the arbitrators recommending it to the parties, to consent that an order might be made by this court, for the appointing a proper person to receive in the debts due to the partnership, is deputing a third person to do an act, which ought to have been done by themselves, and therefore is not properly their own judgment.

The third objection, that the arbitrators ought to have settled the release themselves, and not have left it to be done by a Master under the order, and directions of this court; and cited *alk. 71. Glover v. Barrie*.

That upon the whole it was not a complete award, and therefore the plaintiff should be admitted to go on with his bill for account, notwithstanding the award.

Mr. Attorney General, counsel for the defendant *Eade*, in answer to the second objection, with regard to the receiver, said, the arbitrators could not do otherwise, as it was uncertain what

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would be got in, and therefore they could not award the exact sum to each of the parties, but to be divided when received.

Lord Chancellor then put this case to *Mr. Attorney General* (which came before him, when he was *Chief Justice*); *Arbitrators* had awarded that each of the parties should give security to perform the award, but left it to a third person to settle the securities, and for this reason held it to be a void award; compare now this case with the present, where the arbitrators have referred it to a third person to get in the debts due to the partnership.

To this *Mr. Attorney General* said, the award is final as to the property, but the means of ascertaining that property is only recommended to be left to a person appointed by the court; in the case mentioned by your Lordship, the arbitrators actually transferred to a third person, a power which belonged solely to themselves.

As to the objection that the award is bad, because the form of the release is left to a Master; as long as the substantial part, the awarding a release of all demands, is provided for by the arbitrators; the bare leaving it to a Master to settle the form of the release, can never vitiate the award.

Mr. Murray the Solicitor General said in reply, The arbitrators here have awarded things out of the submission, that affects the justice of the case between the parties, which vitiates the whole award, and consequently is no bar to the account.

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LORD CHANCELLOR,

Though the bill is brought for two purposes, yet one is consequential to the other.

First, to set aside the award.

Secondly, for a general account.

Improper to come into this court to set an award aside merely for an objection in point of form.

The prayer of the bill to set aside the award must be founded upon the fraud, corruption, or misbehaviour of the arbitrators (1); for it would be improper to come into this court to set it aside merely for an objection in point of form (2).

The other part of the bill is the original right he had before the award.

I must consider the plea as it is pleaded to the latter part of the bill, the general account.

For to be sure, the plaintiff is intitled to an account, unless the award is a bar, and therefore the court must enter into all the legal objections against the award, which a court of law would have done, as it is insisted on by the plea to prevent the general account.

Courts of law formerly used too much nicety in determining awards.

I own I have been a good deal doubtful as to the nicety that courts of law have used, in determining awards; for they have formerly gone so far, as to make it almost impossible for arbitrators to do what is the main intention of the submission, the putting an end to differences between parties.

(1) *Kempshire v. Long*, ante 155. (2) Vide *Champion v. Wenham*, Amb. 245.

But now courts of law themselves have in some measure departed from very strict rules, as where arbitrators refer costs to be taxed, the judges have compared awards to judgments at law, which though they must have certainty, yet the officers tax costs, and therefore where arbitrators give such directions it shall not vitiate the award; though in the old cases it has been held, that arbitrators could not in any instance delegate their power.

It may possibly be worth while for me to consider, as courts of law themselves have relaxed from their rigour and nicety in determining awards, whether courts of equity may not still take greater latitude: but I am unwilling to do this, because it would introduce confusion and uncertainty, and make awards a mixed state, partly determined by arbitrators, and partly by the authority of this court; and therefore I chuse rather to confine myself to one rule.

* As to the first objection, with regard to debts due from the partnership, I will not lay any weight upon it, for as courts of law have said, they will never make a presumption to overturn an award; so neither will I in this case presume that there are any other debts due from the partnership, than what are mentioned by the arbitrators themselves.

As to the second objection, with regard to the receiver, which is recommended by the arbitrators, I own I have great doubts; but as the justice between the parties is the material thing, and the award being good to a common intent, answers the purpose of parties in submitting to a reference, I am of opinion it is sufficient, for in cases of this sort, in mercantile affairs, which cannot admit of certainty, it would be too nice to defeat awards upon objections of this kind.

It has been said by the plaintiff's counsel, that the arbitrators commending it to the parties to consent that an order might be made by this court, for the appointing a receiver, &c. and in case of the parties refusal to consent thereto, the requesting the court to order the same, is a delegation of their power, which arbitrators cannot do (2).

And to be sure, if they have delegated their power, the award is void for the whole.

But Mr. Attorney General says, what the arbitrators have done in this respect, is at most but surplusage.

Yet if it affected the justice of the things submitted, it would not be surplusage.

But this seems to me to be only a recommendation of the arbitrators to the parties, which is not tying them down to submit that a person should be so appointed, but leaves them at large; and if the parties do not approve of this scheme, then it is surplusage only, and not a delegation of their power.

The question is, Whether the arbitrators awarding that the debts due to the partnership, when received, shall be divided in proportions between the parties, is sufficient; and I am opinion

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Tho' arbitrators refer costs to be taxed; yet it will not vitiate the award at law (1).

If courts of equity were to take greater latitude in determining awards than courts of law, it would introduce confusion and uncertainty; better therefore to adhere to one rule. As courts of law have said, they will never make a presumption to overturn an award; so neither will a court of equity. Where an award is good to a common intent, and answers the purpose of parties in submitting to a reference, the court will not let it slide upon trivial objections. If arbitrators delegate their power, the award is totally void.

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(1) *Winter v. Garlick*, 1 Salk. 75. (2) *Lower v. Lower*, 1 Roll Ab. 244. Fed. Cu. 195. S. C. Com. 329. pl. 20. *ibid.* 251. pl. 11.

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Arbitrators need not point out particularly the method in which the award is to be carried into execution.

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Where arbitrators have awarded releases, the leaving it to the court to give directions to a Master to settle the form, does not vitiate an award.

it is, for the arbitrators had no controul over the debtors themselves, who might pay, if they pleased, the whole to one of the partners.

To lay it down for a rule that arbitrators must chalk out particularly the method in which the award is to be carried into execution, would be too nice, and overturn a great number of awards: for if this doctrine was to prevail, suppose one of the parties should release a debt due to the partnership, it would be a breach of the award, for *qui dirimit medium dirimit finem*, and the other party could have no remedy, but either to bring an action or a bill for carrying the award into execution, which would make it endless, and no award could ever be effectual to finish disputes between parties.

I cannot think of any other method the arbitrators could have pursued; for though it has been said at the bar. that they might have directed the parties to give such person as the arbitrators should appoint a letter of attorney to get in the debts, yet this would not have been adviseable, because if the person so deputed had proved insolvent, it would have been doubtful whether the arbitrators themselves might not have been liable.

The last objection is, the arbitrators leaving it to a Master to settle the form of the release,

The last objection is, the arbitrators leaving it to a Master to settle the form, does not vitiate an award.

Now the general rule in regard to making awards is this that arbitrators should award each party to give a release, and if they do not, it is at the peril of the parties.

Here it is, in the first place, fully and completely described in the award, what the parties should do in point of giving releases, and then follows the reference to the Master to settle the form.

If the award had said, that the release should be settled by the court first, and then the arbitrators would consider whether they should order a release between the parties, this would have been very different, and I should have inclined to think it a delegation of their power, and the award consequently void.

But here they have awarded releases, and only leave it to the court if they think proper, to give directions to a Master to settle the form; and it would be very extraordinary when, I think, the arbitrators have done all that is necessary, and there is no occasion for the court to interfere; yet, because they have said, we leave it to the court, therefore I must interpose merely for the sake of making that a bad award, which, without my interposition, would be a good one.

Upon the whole I am of opinion, the award is good to a common intent, and the plea consequently must be allowed against the general account; but the plaintiff is not precluded at the hearing of the cause from objecting to the award for fraud or partiality in the arbitrators.

Anon. February 18, 1742, First Seal after Hilary Term.

Case 305.

AN attachment issued against a person out of this court, and the sheriff had the body in custody, and took a bail-bond for his appearance, which he delivered to the plaintiff, who moved at a former seal, that the sheriff might bring in the body; and the court made a rule upon him to shew cause why he did not bring in the body.

Where an attachment has issued against a person, and the sheriff takes a bail-bond for his appearance, and delivers it to the plaintiff, the

court will discharge a rule made upon the sheriff to shew cause why he does not bring in the body; for the plaintiff is not without remedy, as he may move on a *cepi corpus* returned for a messenger to the county where the person lives (1).

Reddell v. G. L. Suion.

The counsel for the sheriff shewed for cause, that he had delivered over the bail-bond to the plaintiff, and had not the custody of the body now.

Lord Hardwicke allowed the cause shewn by the sheriff, and discharged the rule; for the plaintiff is not without remedy, as he may have a messenger into the county where the person lives, which is now a motion of course upon a *cepi corpus* returned, though formerly the court allowed messengers to those particular jurisdictions only where the sheriff had the amercements themselves; but the rule now is to send a messenger into every county generally without any restriction.

(1) *Vide Anon.* 1 Vern. 116. 154. 2 Bro. Cha. Rep. 181. Anon. 2 P. W. 301. *Wilkinson v. Belfer*,

Francis Emes, Administrator of his Wife Elizabeth Emes, Plaintiff, Case 306.

Thomas Hancock Defendant. Between the Seals after Hilary Term 1742 (1).

Paole v. Perry. 4 Simon. 296.

THOMAS Hancock, grandfather to Elizabeth the plaintiff's

late wife and to the defendant, on the 2d of June, 1729, made his will, ("reciting that he had surrendered all his copyhold lands to the use of his will) and did thereby give and
"devise the said lands to his wife Elizabeth and her assigns for
"life, and after her decease to his son Stephen, till his grandson
"the defendant Thomas attained the age of 23, and no longer,
"and so soon as his grandson attained that age, then he gives
"it to his said grandson, his heirs and assigns for ever, on this
"condition that the said grandson, his heirs or assigns should pay or
"cause to be paid unto his grand-daughter Elizabeth Hancock the

T. H. devises copyhold lands he had surrendered to the use of his will, to his wife for life, and after her decease to his son Stephen, till the defendant his grandson attained the age of 23, and as soon as he attained that age, gives it to him and his

heirs, on condition that he pays to Elizabeth Hancock 60*l.* within two years after he attains 23, and in default of payment of the 60*l.* then the testator gave Elizabeth Hancock a power to enter and receive the rents till the 60*l.* was paid.

The testator died soon after making his will; Elizabeth Hancock married the plaintiff, and live the defendant attained his age of 23, but died within the two years after he attained that age. Hardwicke decreed the 60*l.* to be raised out of the copyhold lands, and to be paid to the plaintiff.

(1) *Reg. Lib. A.* 1742. fol. 229.

H h 4

*Southdown v. 3200
2. 4 c Co 22. 54
Killy v. Fitzgerald*

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"sum of sixty pounds within two years after his said grandson attained his age of twenty-three, and if his said grandson should happen to die without issue of his body, then he gave and devised the same to his son Stephen Hancock and his heirs, on condition of paying the sum of one hundred pounds to Elizabeth Hancock within one year after his son Stephen Hancock enjoys the said premises by virtue of this last devise; and his will further was, that if his said grandson or son should make default in payment of the said sum of sixty pounds, then it should be lawful for his said granddaughter Elizabeth Hancock, her executors and administrators, to enter into the said premises, and the rents thereof to receive and take till the sixty pounds should be paid."

The testator died soon after making his will, and his son Stephen proved it: Elizabeth Hancock married the plaintiff, and lived till after the defendant her brother attained his age of 23, but died before the two years were expired after his attaining that age.

It was insisted by Mr. Wilbraham and Mr. Capper, counsel for the plaintiff, that the sixty pounds was a vested legacy, and transmissible to Elizabeth's representative.

The case of *Lowther versus Condon* 6 June, 1741 (1), upon a rehearing before Lord Hardwicke, was principally relied upon for the plaintiff.

Mr. Brown for the defendant insisted that the 60l. should sink into the inheritance, as the time of payment was not come.

He cited *Carter v. Bleisoc*, 2 Vern. 617. *Tournay versus Tournay*, Prec. in Chancery 290. and *Hall versus Terry*, Nov. 8, 1736, before Lord Hardwicke. Vide 1 Tracy Atkyns 502.

LORD CHANCELLOR,

All these cases depend upon circumstances; the present is a particular kind of case, and differs from all the others.

The court has often in these cases laid a good deal of weight upon a child's dying before marriage, and before the portion is wanted, but here Elizabeth Hancock was married some years before she died.

What is the operation and effect of the devise in point of law? I take it to be a conditional limitation (2), and therefore whatever right Elizabeth gained thereby is a legal estate.

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She need not have resorted here, on the common suggestion, that as none but an heir at law can take advantage of a condition broken, that she is without remedy at law; for, upon default of payment, it is specially provided for by the will, that she, her executors, and administrators, shall have a power of entering and

(1) *Ante* 127. 130. S. C.

(2) So *Wigg v. Wigg*, ante 1 vol. 382. *Tinsell v. Bracken*, Amb. 167. 170. 1 Bro. Cha. Rep. 124. S. C. *Jeale v. Tuckner*, Amb. 703. *Sherman v. Col-*

lins, post. 3 vol. 322. Vide etiam *Hutchins v. Foy*, Com. 716. *Hodgson v. Rawson*, 1 Ves. 47. *Embrey v. Martin*, Amb. 230.

ng till satisfied (1): Because *Elizabeth* died within the two , is it either a breach of the condition, or an excuse for not g the sixty pounds?

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is said the condition is become impossible: but I am of opi- it is not; for in point of law the condition subsists, not- tanding she died within the two years: Suppose a bond to *A.* payable at a future time, without naming his exe- s, administrators or assigns, why if *A.* dies before that time, recutors, though not named, would be intitled to sue upon ond (2).

A bond given to *A.* payable at a future time, without naming his executors, if *A.* dies before that time, the executors will be intitled to sue upon the bond.

the husband then, as administrator in this case, could re- it, even at law, has it been ever held, that because he has al remedy, therefore equity will not give it him, but ought here to its strict rules, and leave him to law; consider what tion this would make; for even after the administrator ecovered a judgment at law, the defendant would have a to come into this court, upon payment of the sixty pounds redemption, and this would occasion a circuitry, and two instead of one, an inconvenience which this court always s.

ie testator's appointing two years after his grandson attained ty-three, for raising the sixty pounds, seems to be done ly for the convenience of the estate (3).

ie case of *Tournay* versus *Tournay* comes the nearest to this; here the child for whom the provision was made died very g, at five or six years of age, so that the portion not being ed, the court exercised a discretionary power, and would ise it.

ere is a further circumstance, for the will says, *if my said son should die, &c.* Vide the words of the will.

ppose *Thomas Hancock* had died within the two years (for had died after, *Elizabeth* would have been intitled only to xty pounds) and the money had not been paid, and he had son, and the son had likewise died within the two years, hen *Elizabeth* had died before the year was out, which the or had allowed to *Stephen Hancock* for payment of the 100*l.* d not the plaintiff, as representative of *Elizabeth*, been in- to the 100*l.*? Most certainly he would; and the case of *versus Withers*, Cases in *Lord Talbot's* time 117. is for this se directly in point; and from hence may be argued, that ntention of the testator was, that his granddaughter *Eli- b* should have one or the other.

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pon the whole, I see no equity at all for taking the portion *Elizabeth*, or sending her representative to law, and there- I shall decree the sixty pounds to be raised out of the copy- land, and paid to the plaintiff accordingly.

) *Wig v. Wig*, ante 1 vol. 382. (3) Vide *Loxeth v. Condon*, ante 129.
an v. *Collins*, post. 3 vol. 322. note. *Sberman v. Collins*, post. 3 vol.
; *Anon.* 1 *Salk.* 170. 319. note.

Where one partner is out of the kingdom, the partner before the court shall pay the whole of a joint demand.

6. 200
1. 200
2. 200

Where a defendant cannot be made to appear, it amounts to the same thing as if process had been taken out for want of an appearance, and carried on to a sequestration.

THE question was, if a bill is brought against one partner for a joint demand, and the other is not amenable to the court, being out of the kingdom; whether the partner before the court shall pay the whole, or one moiety of the debt.

LORD CHANCELLOR,

Upon considering this case, I am of opinion, that the partner before the court ought to pay the whole.

This is analogous to the proceedings in courts of law, and likewise in this court; for where a defendant is out of the reach of the court, and cannot be made to appear, it amounts to the same thing as if the plaintiff had taken out process for want of an appearance, and carried it through the whole line of process to a sequestration.

In this case it is in vain to take out process, because the joint debtor is out of the kingdom.

In equity you may take exceptions for want of parties, at the hearing of the cause, or demur, but you cannot plead it in abatement at law, after you have gone upon the merits.

An exception for want of parties here, is in the same nature with a plea in abatement at law, but if you go upon the merits there, you can never take it up again. Now, in equity, you may take exceptions at the hearing of the cause, or you may demur for want of parties.

At law, where one of the creditors will not join in the action, he is summoned and sequestered, and the other has judgment *quod sequatur solum*.

In the first place, what is the method of proceeding at law, in case of a joint demand, if one of the creditors will not join in the action, he is summoned and sequestered; if he will not proceed jointly after summons and severance, then the other creditor has judgment *quod sequatur solum*.

Where an action is brought against two joint debtors, and one only appears, the creditor may have judgment for his whole debt against the person appearing, and by default against the person who does not appear.

* On the other hand, if there are two joint debtors, the creditor must bring his action against both; but if one only appears, and the creditor carries it on through the whole line of process to an outlawry, against the person not appearing, then he may proceed solely against the other, and shall have judgment for his whole debt against the person appearing, and judgment only by default against the person who does not appear, which is all that he can do with regard to the latter; for, as to his goods, they are forfeited to the crown upon the outlawry.

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(1) Vide *Corry v. C. J.*, Pre. Cha. 83. 1 *Eq. Ab.* 73. S. C. *Rogers v. Bunb.* 200.

The

edings upon the act for making procefs in courts of law against persons who refuse to appear, 5 G. 3. DARWENT v. WALTON.

1. are as follows, "Upon the defendant's not appearing the court may order the bill to be taken *pro confesso*, such decree as shall be thought just, and may thereupon to compel the performance by an immediate sale, or by causing the possession of the estate or estate to be delivered to the plaintiff, or as the nature of the case shall require."

act, you might carry it on through the whole line against a defendant, who did not appear to the second no further; but you might, notwithstanding, set the case against the other defendant, and have a decree.

ould do this before the act of parliament, where a defendant in the kingdom, but obstinately refused to appear, might the court to make a decree against one part, the other is out of the kingdom, that an account be taken, and that the whole which appears to be due to the plaintiff should be paid by the defendant, the partner who is heard; and his Lordship ordered it accordingly.

Fitzes and Stephens, February 22, 1742.

Case 308.

Rivers by his will gave an annuity of 50*l.* a year, life, to *Catharine Adair*, now *Fitzes*, the plaintiff will gave an annuity of 50*l.* payable quarterly, and by a codicil, directed that to the plaintiff, should be charged with the payment of it. who afterwards, in 1726, married

Fitzes; in 1728 they agreed to part; by a deed of separation, the husband covenanted to pay 14*l.* per ann. out of his own estate, and 24*l.* more, to be paid quarterly, out of the income of 12*l.* a year to his daughter, by the plaintiff, for her maintenance, to be paid quarterly

against the husband, and *Stephens*, a creditor of his, since the execution of the deed of separation, to have the fruits of that deed performed. Lord Hardwicke decreed against the husband; and as to *Stephens*, that he should not release his claim until the plaintiff had paid him his debt.

he married the defendant *Fitzes*, and in 1738 they parted, and by a deed of separation the husband covenanted to pay her a separate maintenance of 14*l.* per ann. out of his own estate, and 24*l.* more to be paid quarterly to her out of the income of 12*l.* a year to his daughter by the plaintiff, to be paid quarterly, to such person as should maintain

was brought by the wife and daughter against the husband against *Stephens*, who is a creditor of the husband, the execution of the deed of separate maintenance, and all his estate real and personal has been assigned, and the directions of the insolvent debtors' act, 2 Geo. 2. to be the trust of the deed performed.

[512]

Thompson
Thompson
H. Brown
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Thompson v. Boston
44 1-
Wilson v. Hill
14 Jan: 40
Thompson v. Boston
9 Jan: 45
Wilson v. Hill

FITZER V.
FITZER.

It was insisted by the defendant *Stephen's* counsel, that this was a voluntary deed, being made after marriage, and with regard to creditors is fraudulent and of no consideration, and clearly within the *St. of 13 Eliz. c. 5. Twyne's case, 3 Co. 81. and Eq. Caf. Abr. 148.* were cited to shew that natural love and affection is no consideration.

For the plaintiff it was insisted that the *13 Eliz.* says only that it shall be a good consideration, and not a full and adequate consideration: and that this conveyance if for a good, though not an adequate one, has taken it out of the statute. *Vide Jones versus Marsh, Caf. in Ch. in Ld. Talbot's time 64.* was cited.

They argued likewise from the inconvenience that would arise if such a construction should prevail, as is contended for by the creditor's counsel, because it would be almost impossible to make a settlement of separate maintenance, that would be of any force, which though they are not desirable, yet are too often necessary things, for the husband by contracting debts afterwards would have it in his power to defraud the wife, and deprive her of any maintenance.

The true construction, they said, upon the statute was, that where a deed is merely voluntary, and intended as a fraud, that it should be considered as fraudulent against creditors, but where there is some consideration, though not a full one, that it should be otherwise.

The creditor had him in execution only for 50*l.* and 12 years afterwards the husband took the advantage of the insolvent debtors act.

LORD CHANCELLOR,

Have you any instance of it's being held in this court, that a conveyance from a husband to a wife without any pecuniary consideration moving from the wife, has been held to be good against creditors?

[513]

Mr. Attorney General, counsel for the plaintiff, said that indeed natural love and affection alone would not be a consideration; but here there is a very good one, the maintenance of the wife and daughter; for suppose the wife had instituted a suit in the spiritual court for alimony, and the husband by way of defence had insisted there upon his deed of separate maintenance, they would have considered it as a provision in that court, and given sentence against the suit, which shews that the ecclesiastical court do not hold it to be voluntary, but binding upon the parties.

LORD CHANCELLOR,

The question is with regard to the deed of separation in 1738, and the trusts declared in it, whether they are fraudulent within the *13 Eliz.* against the defendant *Stephens* the creditor (1).

(1) See *ante* 1 vol. 15. *Russell v. Hammond.*

It is certain that every conveyance of the husband that is voluntary, and for his own benefit, is fraudulent against creditors.

Consider then whether this trust deed is not so.

The plaintiff before marriage was intitled to a rent-charge of 50*l.* a year for her life from Lord Rivers's estate, she marries the defendant *Fitzer*, and for some time afterwards they lived together as man and wife, and though the husband by law is bound to maintain his wife and child, yet still the funds out of which the maintenance is to arise are liable to his creditors.

This being so, he conveys the annuity to trustees to secure the payment of 24*l.* *per ann.* to the wife, and 12*l.* to the daughter.

It has been insisted on the part of the plaintiff, here is a sufficient *valuable* consideration, though it was admitted on all hands that natural affection alone is not one; but I by no means allow this is a consideration, for if it was, a husband and wife need only agree to put some part of *his* estate out of his power, by vesting it in trustees for her separate use in order to defraud the creditors.

The case in the spiritual court put by the Attorney General is upon the misbehaviour of the husband, and is the determination of a court of justice, who have jurisdiction in these cases: besides their decrees for alimony and maintenance are only against the person of the husband, and do not affect any part of the estate, so as to take it from the husband's creditors.

FITZER V. FITZER.
Every voluntary conveyance of the husband is fraudulent against creditors. Tho' husband by law is bound to maintain his wife, and child, yet the funds out of which the maintenance is to arise, are liable to his creditors.

The decrees in the spiritual court for alimony and maintenance are only against the person of the husband, but affect not the husband's estate so as to take it from his creditors.

husband's estate so as to take it from his creditors.

A proviso in the deed of separate maintenance, that if the wife contracts debts whereby the husband is chargeable, then the deed is to be void; so that notwithstanding this deed she may at any time disavow it, and take up goods according to her rank, or here is no covenant on the part of the trustees to indemnify her husband, but rests barely upon the agreement.

[514]

It has been argued for the plaintiff, that the husband is delivered from the burden of maintaining his wife and daughter.

But here is no covenant from the trustees or relations of the wife, that the husband shall not be obliged to allow her a greater maintenance, or that the husband shall be discharged from such maintenance.

It is still stronger with regard to the daughter, for she was an infant at the time the deed was executed, and could not be bound by it; and besides the father by nature is obliged to maintain her; so that the parties are not bound at all.

Then consider it as an assignment which the husband himself may make use of to fence against creditors, and consequently it is fraudulent.

This case stands quite abstracted and naked from any cases, where there may be a covenant by relations of the wife to indemnify the husband against debts of the wife; but I will not now determine

**FITZER v.
FITZER.**

Considerations
are not to be
weighed in too
nice scales.

determine what the construction of even such a deed would be, with regard to a husband's creditors (1).

This is not like the case of *Jones versus Marsh*, for there 100% was paid by the wife's relations, and I am not to weigh considerations in too nice scales (2).

The next thing which has been insisted on for the plaintiffs, is, that supposing no such deed had been executed, as it was a rent-charge of the wife's before marriage, and the husband had become a bankrupt, the court would not have decreed it to the assignees during the life of the husband, unless they had first agreed to secure some provision for the wife.

This is the case of a freehold of a wife, and devised to her for life, and during the coverture the husband might have a legal remedy by distress for the arrears: but he could not have conveyed it away to her prejudice, for if she had survived, she would have been intitled to the rent-charge again.

The husband
during the co-
verture had a
legal remedy by
distress for the
arrears of the
annuity, with-
out being first obliged to make a provision for his wife.

Would the court, where this is the case, have hindered the husband of his legal remedy by distress, till he had first made some provision for his wife: I apprehend by no means (3), any more than they would do it where a man marries a woman seized of lands in fee.

Creditors in
bankrupt cases
are intitled to
the interest the
husband has in
the wife's *chose
in action* during
his life.

* And even in the cases of assignments of bankrupts estates, or in the late case of *Jeruſon versus Moulſon & é con'*: Oñ. 27, 1742, *vide ante* 417, the court have not determined that creditors are not intitled to the interest the husband has in the wife's *chose in action* during his life, but have recommended it to them to allow a gross sum to the wife by way of provision, and to take the rest to themselves to prevent a greater trouble.

[*515]

His Lordship decreed that upon the plaintiff Mrs. *Fitzer*'s paying the defendant *Stephens* the remainder of his debt, that *Stephens* should release all his right to the annuity to the trustee of the deed of separate maintenance.

He decreed likewise the trusts of the deed to be performed, as against the defendant *Fitzer* the husband.

Costs were given to *the creditor* only.

(1) But it has been since determined, that a covenant of indemnity to the husband by trustees against the debts of the wife, is a sufficient consideration as against creditors. *Stephens v. Olive*, 2 Bro. Cha.

Rep. 90. *King v. Brewer*, *ibid.* 93. *Compton v. Collinson*, *ibid.* 386.

(2) *Middlecome v. Maſlow*, *post.* 521.

(3) *Jeruſon v. Moulſon*, *ante* 420, and references.

Case 309.

Poore versus Clark, February 22, 1742.

Where you draw
the jurisdiction
out of a court of
law, you must
have all the
parties before the court, who are necessary to make the determination complete, and to quiet the question.

A Bill was brought by a lessee for 21 years, under the Dean and Chapter of *Winchester*, against a Lord of a manor, and the tenant of a particular house, that it might be pulled down, as

obstructed the plaintiff's way to his fields, and to be quieted in the possession of the way for the future.

FOOTE v.
CLARE.

The defendant's counsel objected for want of parties, because Dean and Chapter of *Winchester*, who are the owners of the inheritance, are not brought before the court.

LORD CHANCELLOR,

If the relief can be only temporary, it must be left to law; in cases of this kind the court will not interfere unless they make a lasting and permanent decree, that shall for ever set and settle the right, and will not decree it for a particular time only.

The plaintiff here might as well have been a tenant for one year as twenty-one, or even a tenant at will.

If the question was concerning a right of common, though a freeholder might establish it at law, yet if he brings a bill here to establish such right, was it ever done without having the matter of the inheritance before the court; the same rule holds on a bill brought by a lessee for tithes, or for establishing a right (1); so is the practice of the exchequer; for the general rule is, that if you draw the jurisdiction out of a court of law, you must have all persons parties before this court, who will be necessary to make the determination complete (2), and to settle the question.

[516]

The case of *Busb versus Western, Prec. in Ch. 530.* is different from the present, because the defendant there rested entirely upon a forfeited mortgage, and did not set forth who the owner of the inheritance was, or pray that he might be made a party; upon the whole, this is a good objection for want of parties.

As to the objection of not making the rest of the freeholders and lessees of the manor parties, if they do not think proper to dispute the plaintiff's right, the plaintiff is not obliged to bring them before the court; but if they should not submit to the right claims of the way, a decree against the lord of a manor will bind copyholders in fee, or freeholders for life, but they may controvert the right notwithstanding.

A decree against the lord of a manor will not bind copyholders in fee, or freeholders for life, who were no parties to it.

- 1) *Mayor of York v. Pilkington*, ante 1 vol. 282. (2) *Pawlet v. Bishop of Lincoln*, ante, 296.

Shudal versus Jekyll, February 25, 1742.

Case 310.

Booth v. Allen
2 Rep. c. 11. 276

THE bill was brought against the executors of Sir *Joseph Jekyll* for a legacy of 1000l (1).

Sir *Joseph's* will was dated the 4th of May 1738, soon afterwards Mr. *Shudal* the plaintiff's late husband made his address

A legacy of 1000l. given under the will of J. to the plaintiff, not satisfied by the

500l. given upon the marriage in the testator's life-time.

(1) It does not appear that there was any particular time appointed for payment of this legacy.

Due to the executor to
3 3. 4 8 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

SHUDAL V.
JEKYLL.

Wharton

Legat. Ambass.
H. K. 472

Lockyer

Hydr. 29.

K. 8. 1. 1. 1.

Har. 509

to her, and some time in *July* following applied to Sir *Joseph*, who was her uncle (1), for his approbation, who being satisfied with the match, said he would give him 500*l.* but as it was not convenient to let him have the money, he would draw a note payable to him on the 25*th* of *March* 1739, and lodge it in Mr. *Hill*'s hands, to be delivered to Mr. *Shudal* after the marriage was had, (which he did accordingly), and also said that he would leave something to his niece by his will, but that he would not be put under any obligation of doing it.

Upon the 19*th* of *August*, 1738, Sir *Joseph* died without revoking his will, and the very next day the plaintiff and Mr. *Shudal* were married.

The question is, whether the legacy of 1000*l.* given to the plaintiff under the will is satisfied, by the 500*l.* given upon the marriage in the testator's life-time.

Mr. Solicitor General for the plaintiff,

Argued that this case is not within the general rule of presumptive satisfaction, for when it has been so construed, it is where the bequest under the will is expressly given to a daughter for a portion; and cited *Hartop* versus *Whitmore*, 1 P. W. 681.

[517] Here the legacy of 1000*l.* is given generally to the plaintiff, who is the testator's grand niece: there's no ground to imagine that because the testator gave 500*l.* in his life-time to the husband, he intended it should go in part satisfaction of the plaintiff's legacy. *Vide Spinks* versus *Cope*, Jan. 27, 1742 (2). Besides, the note given to the husband was by no means for her benefit, for it might have gone to his executors, nor was there any settlement made by the husband in consideration of the sum so advanced, and he is now dead insolvent.

Mr. Attorney General for the defendant the executor said, that as the testator was consulted on the match, and not her own father, Sir *Joseph* stands in *loco parentis*, and consequently from the nature of the case it was intended as a portion.

A strong circumstance to shew his intention with regard to the plaintiff, is, that notwithstanding the testator had given to another niece *Margaret Hill*, a legacy of 1000*l.* yet upon advancing to her afterwards 500*l.* upon her marriage, he told his secretary Mr. *Mortimer*, that now she should have but 500*l.* under the will: and though it does not appear that he expressed himself in the same manner upon the marriage of Mrs. *Shudal*, yet it is most natural to suppose that his intention was the same.

The Chancellor made two questions in this case.

First, Whether there is a presumption of satisfaction, of an ademption of the legacy, by what Sir *Joseph* *Jekyll* did afterwards in his life-time.

Secondly, If there is not a general presumption, then whether there is any thing in the cause which amounts to a proof that he intended it as a satisfaction.

(1) She was great niece of the half blood by the mother's side to Sir *Joseph*.

(1) *Ante* 491. S. C.

This must depend upon the note, and the evidence.

Sir *Joseph* by his will has given to the plaintiff by the name of *Elizabeth Parsons*, and to *Ann Parsons* her sister, a general legacy 1000*l.* a-piece.

About ten weeks after Mr. *Shudal* acquaints Sir *Joseph Jekyll* with his intention of marrying the plaintiff, who approved of the match, and immediately drew a note for 500*l.* payable to *Shudal* the 25th of *March* next.

After this conversation, and the giving of the note, it appears to have been the intention of the parties to have married in a month or three weeks at farthest.

The question is, if there is any presumption to be drawn from this.

I am of opinion that if the case rested here, it would not create a presumption of satisfaction either of the whole 1000*l.* or part of it.

The general run of cases is upon a father's making provision by gift of portion for a daughter in his life-time: this is truly said to be a debt of nature from a parent to a child, and though he gives a legacy generally under a will, yet he must be understood to mean as a portion; and therefore if he gives a sum afterwards to her upon her marriage, it is for the same end, and consequently an ademption of the legacy (1).

marriage, it is an ademption of the legacy.

This court to be sure leans strongly against double portions, or double provisions, and whether the portion given in the life-time is, or not, is no ways material; but all these cases differ exactly from a bounty given by a remote relation, though I will say but there may be cases between collateral relations which should be considered as an ademption; for suppose a child to be an orphan without father or mother, under the care of a collateral relation, who by his will gives her a legacy, and expresses it to be for her portion, and afterwards makes a provision for her in his life-time, I should be inclined to think this an ademption.

expressed to be for her portion, and afterwards provides for her in his life time; Lord *Hardwicke* inclined to think this would be an ademption.

But in the present case, the plaintiff's father is living, and a collateral relation only, *her great uncle*, gives her a general legacy: now I do not know any case where such a relation's gift of a general legacy, and afterwards advancing the same person in his life-time has been held to be a satisfaction, and therefore from the cases of fathers, or grandfathers, standing in *loco parentis* (2).

The chief strength of this case depends upon the second question, whether from the proofs which have been read it appears, that the testator intended it as a satisfaction.

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JEKYLL.

[518]

Parsons
Elizabeth
Ann Parsons

Where a father gives a legacy generally under a will to a daughter, he must be understood to mean it as a portion, and if he afterwards gives her a sum on

Double portions are what this court strongly leans against, and whether the portion given in the life-time be less or not, is no ways material. Where an orphan is under the care of a collateral relation, and he by will gives her a legacy, which is

(1) See *Bellasis v. Urbawatt*, ante 1 vol. 2 note.

(2) *Spinks v. Robins*, ante 492. *Powell v. Cleaver*, 2 Bro. Cha. Rep. 500.

SHUDAL v.
JEKYLL.

In the cases of
satisfaction of
legacies parol
declarations have
always been ad-
mitted.

I am of opinion that the evidence does import quite the contrary, and parol declarations have been constantly admitted in all these cases (1).

Sir Joseph Jekyll's saying to Shudal that he would leave the plaintiff something, but that he would not lay himself under an obligation to do it, for she must take her chance, imports, that he intended to give her a legacy by the will.

[519]

But how is it possible for a court of justice to settle what was the *quantum* the testator intended; and can I imply that he intended to leave her no more than 500 l.

Suppose a father
gives a daughter
500 l. as a por-
tion, in mar-
riage, and says,
I will leave her
something by
my will, but
will not oblige
myself to do it,

Suppose, even in the case of a father, he had given 500 l. to a daughter, or to the husband, as a portion, and had said, at the same time, I will leave her something by my will, but will not lay myself under any obligation, and you must take the chance; a court of equity would not have held this to be an ademption of the legacy under the will.

this would not be an ademption.

But it is said, the construction in this case must be by way of analogy to what Sir Joseph Jekyll has done with regard to another great niece, Mrs. Margaret Hill.

The altering a
will as to one
niece, can never
be taken as an
evidence of the
testator's inten-
tion, to alter the
legacy as to another.

But though he has altered his will, as to one person, I can never take it to be an evidence of his intention to alter the legacy of another person; and therefore, the inference to be drawn from hence, makes rather for than against the plaintiff.

As, therefore, I am of opinion, that even a father giving his daughter a portion in his life-time, and accompanying it with such declarations, would not have been an ademption of any legacy bequeathed to her under a will, *a fortiori* I ought in this case to decree the executor to pay 1000 l. to the plaintiff, with interest at 4 l. per cent. from one year after the testator's death: I shall give no costs on either side (2).

(1) *Roswell v. Bennett*, post. 3 vol. 77. (2) *Reg. Lib. B.* 1742. fol. 184.

Case 311.

Middlecome versus Marlow, February 28, 1742.

Shudal v. Jekyll
A. intitled to
500 l. marries
while an infant,
the husband, by
deed after mar-
riage, agrees that
the 500 l. shall
be to her separate
use for life, and
after her death,
to the issue of
the marriage;

In the deed was a proviso, empowering the trustee to lend a part, or the whole, to the husband; he lent him the 500 l. and in fourteen months after he became a bankrupt; the trustee brought his bill to be admitted a creditor. Lord Hardwicke decreed he should come in as a creditor under the commission for the money he paid to the husband.

A. Who was intitled to a leasehold estate, and a share in the residue of her father's personal estate, amounting to 500 l. marries during her infancy; the husband, by deed after marriage, agrees with her father's executors that the 500 l. shall be settled to her separate use for life, and after her death, to the issue of the marriage; and in the deed is a proviso empowering the trustees to advance the husband all or any part of the money by way of loan.

In the deed was a proviso, empowering the trustee to lend a part, or the whole, to the husband; he lent him the 500 l. and in fourteen months after he became a bankrupt; the trustee brought his bill to be admitted a creditor. Lord Hardwicke decreed he should come in as a creditor under the commission for the money he paid to the husband.

In

urfsuance of this proviso, the trustees lent the husband all
ney, and, fourteen months after the execution of the deed,
ame a bankrupt. MIDDLECOMB
V. MARLOW.

bill is brought by the trustees to be admitted creditors
the commission. [520]

defendant, the assignee of the bankrupt, insists this was
an by virtue of the proviso to the husband, but a payment
of the legacy.

ceipts were produced under the husband's hand, for mo-
: on account of the legacy, one of which was before the
for the sum of one hundred pounds, the rest after the exe-
of it.

D CHANCELLOR,

question is, Whether this deed is upon such a confide-
is to prevail against creditors.

of opinion it is; for if a man marries an infant, and
no manner of provision before marriage, a settlement
sterwards is good, where there is no proof of his being
d at the time. A settlement
made after mar-
riage is good,
where the hus-
band was not in-
debted at the
time, and the wife, when married, an infant

e present case, it is very far from being an unreasonable
nt, as there was no part of the husband's estate settled.

is not within the meaning of the 13 Eliz. which confines
ch conveyances as are made to defraud creditors; now at
: this deed was made, there was not so much as a single
(1); so that even taking it at law, it would be difficult
creditors to come at it.

re was any doubt as to the time of the execution, it might
und for directing an issue; but the evidence is, that it
cuted about the time it bears date.

being so, if you consider it upon the general equity in
rt, neither the husband, nor any person standing in his
an have the fortune of the wife, without making a pro-
:).

: trustees of the husband have done the same thing with
o the wife, which the court would have obliged them to
is it unreasonable? For though I agree the court would
: directed this settlement, supposing the husband had any
his own to settle, yet it was very proper, as there is no
ation of the husband's side, and as the court would have
t the same thing, upon the Master's reporting this to be
instance of the case, there is no ground to call it an un-
le settlement (3). Neither the hus-
band, nor a per-
son standing in
his place, can
have the wife's
fortune without
making a pro-
vision.

The

Jeffell v. Hammond, ante 1 vol. 15. 22. *Brown v. Jones*, ante, 1 vol. 195.
Cawson v. Moulson, ante 420. and *Wheeler v. Garyl*, Amb. 121. *Ward v.*
there referred to. *Shallet*, 2 Ves. 17.
3 *Moor v. Rycault*, Pre. Cha.

MIDDLECOME
v. MARLOW.

If a settlement
be just in general,
a particular
advantage on
one side or the
other will not
affect it.

The court never weighs nicely, what will be the particular advantage on one side or the other under a settlement, if it is just in general (1).

Though after the execution of the deed, the receipts are given as for a legacy, yet it must be taken to be upon the footing of the deed of trust, and therefore I must decree the plaintiff to come in as a creditor under the commission for such money as he paid to the husband after the deed was executed.

(1) *Fitzner v. Fitzner*, ante 514.

Case 312.

Wood versus Briant, March 3, 1742.

S.C. cited 1 Ves.
501.

A father, administrator *durante minore aetate* of his daughter, who was executrix and residuary legatee of her grandmother's estate, agreed, when

she married with the plaintiff, that he should have 800 l. which in the settlement is called a *portion*: but *Hardwicke* refused to decree an account of the grandmother's personal estate, as she had been dead twenty years; but directed the father's representative should account for his personal estate as to the 800 l. only, and interest at 4 l. per cent. from the marriage.

THE plaintiff's wife was intitled to the residue of her grandmother's estate under her will, and likewise was left executrix, and *durante minore aetate* her father was administrator: at the time of her marriage with the plaintiff, he was, by agreement, to have 800 l. from the father, which in the settlement is mentioned to be a portion, and in consideration of natural love and affection.

It was insisted for the plaintiff, that he is intitled to an account of the residue of the grandmother's estate from the representative of his wife's father; and that the 800 l. paid by her father upon her marriage, was not in satisfaction of this residue, especially as it is expressed to be given for natural love and affection; and as the father, at the time of the marriage, was worth at least 8000 l. and had only this daughter and one son, his counsel argued it was not probable he meant it as a satisfaction.

That constructive satisfactions must be drawn from circumstances.

That there is no case to be produced, where a father is indebted to a child on account of a demand under the will of a collateral relation; that before the demand is liquidated, his giving a sum as a portion to this child has been held to be a satisfaction of this demand: for this purpose was cited *Praxin Chan. Chidley versus Lee*, 228. and *Barnham versus Phillips*, heard about a year ago before Lord *Hardwicke* (1).

The counsel for the defendant rested chiefly upon the personal declarations of the plaintiff and his wife, soon after the marriage, that the 800 l. was intended both as a portion, and a satisfaction.

(1) *Ante* 215. S. C.

*Sono
Morgan
ye 6. 407
Dickinson
Lord Holland
P. B. 15
Punkett & Lewis
Hare 316
Layton & Worsley
8. 150 & 161: 21. 18*

WOOD v.
BRIANT.

in likewise as to the residue of the grandmother's estate, and the depositions of six or seven witnesses were read, which were very full to this point.

To encounter this, on the plaintiff's side was read the evidence of the father's declarations before and after the marriage; at, he said, his mother had left 500*l.* at least to his daughter; and that he would give *John Wood* (the plaintiff) 1000*l.* to make a man of him; and, not above six weeks before his death, said to the plaintiff, thou knowest I owe thee a great deal of money, and thou shalt not be wronged of a farthing.

LORD CHANCELLOR,

The plaintiff is intitled, of course, to what remains due upon the 800*l.*

The doubt is, whether there ought to be an account taken of the grandmother's estate.

I am of opinion, there are no grounds to direct such an account.

If I was to do it, after such a length of time as twenty years, and so long the grandmother has been dead, it would be laying down a rule that must create great confusion.

The first question is, Whether there is a presumptive satisfaction of the legacy to the plaintiff's wife, under the grandmother's will, by the 800*l.* being advanced to her by the father on her marriage.

I do not think any certain rule can be laid down, but the cases must depend upon their particular circumstances.

There are very few cases where a father will not be presumed to have paid the debt he owes to a daughter, when, in his life-time, he gives her in marriage a greater sum than he owed her: for it is very unnatural to suppose that he would chuse to leave himself a debtor to her, and subject to an account.

In most cases a father will be presumed to have paid the debt he owes a daughter, when in his life-time he gives her a greater sum in marriage.

The word *portion*, to be sure, may imply a fortune out of the father's estate; but, on the other hand, it relates likewise to what the wife brings with her in marriage, and answers to the word *dos* in Latin; so that it is as properly and naturally applied to this case as the other, and no argument in favour of the plaintiff is to be drawn merely from the term *portion* being made use of in the marriage-settlement.

Portion, not only implies a fortune out of the father's estate, but may also relate to what the wife brings with her in marriage, and answers to the word *dos* in Latin.

* As to the case of *Chidley* versus *Lee*, the ground Sir *John Trevor* went upon was, that the husband knew nothing of the legacy to the wife from the collateral ancestor, and therefore held he was not satisfied by the portion, though it was a much larger sum than the legacy: but I must own I think that was an extreme hard case, and I believe I should have been inclined to determine it otherwise.

Lord Hardwicke expressed his dislike of the decree, in the case of *Chidley v. Lee*, and said, he should have inclined to have determined it otherwise.

The other case was *Barnham* versus *Phillips*, heard before me 1741 (1).

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(1) *Ante* 215. S. C.

WOOD v.
BRIANT.

A freeman of London by will divided his estate according to the custom, and devised the dead man's part among his wife and children;

afterwards he gave a daughter 1000*l.* in marriage; held to be a satisfaction of the orphanage share, but not as to her share in the dead man's part.

There the father, a freeman of London, made his will, and divided his estate according to the custom, and the dead man's part he devised among his wife and children; afterwards, in his life-time, he marries one of his daughters, and gives her 1000*l.* which the court declared to be a satisfaction of her orphanage share, but not as to her share in the dead man's part, because it was uncertain, at the time the will was made, to what sum it would amount.

If the present case, therefore, rested upon the presumption only, I should be of opinion that the 800*l.* was a satisfaction for the residue under the grandmother's will (2).

It has been said the legacy was unliquidated, and no account has been taken of the grandmother's estate to this day; and if there were any grounds to think that the residue under her will was more than the fortune given to the plaintiff's wife in marriage, it might be a reason for directing an account of this estate, but 500*l.* is admitted to be the utmost amount.

The evidence on the defendant's side, with regard to the declarations of the plaintiff and his wife, are very strong, and applied directly to the point of satisfaction.

And, on the other side, there are only loose and general declarations of the father, that he was indebted to the plaintiff.

From 1725, the time Lord King came to the Great Seal, the court have never directed more than 4*l.* per cent. interest in these cases.

Lord Chancellor decreed an account of the father's personal estate as to the 800*l.* only, and interest at 4*l.* per cent. from the marriage against his representative; the plaintiff's counsel pressed very much for 5*l.* per cent. but from 1725, the time Lord Chancellor King had the seals, the court have never directed 5*l.* per cent. (3).

(2) So *Macdowel v. Halfpenny*, 2 *Bavret v. Beckford*, 1 *Ves.* 519. *Hanbury v. Hanbury*, 2 *Bro. Cha. Rep.* 352. 529. 501. *Contra Semb. Duffield v. Smith*, (3) *Vide Guillam v. Holland*, ante 2 *Vern.* 258. *Cbidley v. Lee*, *Pre. Cha.* 343. 228. *Crompton v. Sale*, 2 *P. W.* 553.

Case 313. *Vaillant versus Dodemead*, March 4, 1743, at Lord Chancellor's house.

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S. C. post. 546.

592. The defendant having examined Mr. Bristow, his clerk in court, the plaintiff exhibited interro-

gatories for cross examining him, to which he demurred, for that he knew nothing of the matters inquired of, except what came to his knowledge as the defendant's clerk in court, or agent: Lord Chancellor over-ruled the demurrer, and ordered him to answer the interrogatories.

Bristow,

THE bill was to be relieved against a collusive assignment made by the defendant *Dodemead* of a lease to one *Leffcells*, a prisoner in the *Fleet*, in order to avoid paying a ground rent to the plaintiff; the defendant *Dodemead* had examined Mr.

Bristow, clerk in court in the cause, who demurred to the plaintiff's interrogatories on a cross examination.

VAILLANT v.
DUDDELEIGH.

The demurrer was, for that he knew nothing of the several matters inquired of by the interrogatories, besides what came to his knowledge as clerk in court, or agent for the defendant, in relation to the matters in question in this cause, and therefore submitted to the court, whether he should be obliged to answer hereto.

LORD CHANCELLOR,

These demurrers ought to be held to very strict rules; I am of opinion there are several objections to this demurrer, I think it covers too much, and is very loosely drawn, for all demurrers of this sort ought to conclude, that he knew nothing but by the information of his client.

The first objection made against this demurrer is, That it appears in this case, that the matters inquired after by the plaintiff's interrogatories were antecedent transactions to the commencement of the suit, the knowledge whereof could not come to Mr. *Bristow*, as clerk in court, or solicitor,

This demurrer covers too much, it ought to conclude, that he knew nothing but by the information of his client.

The second objection, That this is a cross examination, and wherever at law the party calls upon his own attorney for a witness, the other side may cross-examine him, but that must be only relative to the same matter, and not as to other points of the cause.

The third objection, That it is too general; for the words are, that he knew nothing but as clerk in court, or agent.

Now, the word *agent* is very extensive and uncertain, for no persons are privileged from being examined in such cases, but persons of the profession, as counsel, solicitor, or attorney, for an *agent* may be only a steward, or servant.

* The fourth objection, That one of the interrogatories was an enquiry concerning the proving of the deed of assignment, which was exhibited; I am of opinion, that he ought to answer to this, though he should be privileged as to other matters.

Lord Hardwicke seemed chiefly to rely on the case of the *South-sea Company* and *Dolliffe* (1), which was this: Mr. *Dolliffe*, upon his going abroad as supercargo to the *South-sea* company, entered into articles, wherein was a covenant from Mr. *Dolliffe*, not to demur to any bill the Company should bring within two months after his return to *England*, which time was altered to six months.

within two months after his return, which was altered afterwards to six: *Gambier*, who drew the articles, demurred, as counsel to the company, to *Dolliffe*'s examining him; the demurrer over-ruled, for that what he knew was as the conveyancer only.

Mr. *Dolliffe* wanted to examine Mr. *Gambier*, who had settled the articles touching the time, which Mr. *Dolliffe* suggests was altered without his privity or knowledge.

Mr. *Gambier* demurred, as being counsel for the Company, but the demurrer was over-ruled, for that what he knew was as the conveyancer only.

(1) 2 Ves. 377. S. C.

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It

Loudale -
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Young 58

Where at law the party calls upon his attorney for a witness, the other side may cross-examine him to the point in the case.

Counsel, solicitor, or attorney, may be privileged from being examined in such cases, but not an agent.

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Dolliffe, on going abroad as a supercargo, by articles covenanted with the *South-sea* company he would not demur to any bill they might bring

VAILLANT v. DODEMEAD. It was heard before Lord Chancellor *King*, and Lord *Hardwicke* was counsel in it.

For the plaintiff was cited *Cutts versus Pickering, Ventr. 197.*
Lord Chancellor over-ruled the demurrer (1).

* *A solicitor was produced concerning a rasure of a clause in a will, supposed to be done by his client; but it appearing that this discovery, of which he was now about to give evidence, had been made before the retainer of him as solicitor, the court were of opinion, that he might be sworn; otherwise, if he had been retained his solicitor before; the same law of an attorney or counsel. Cutts versus Pickering, Ventr. 197. See the question respecting the examination of the profession fully discussed in Rejn. Read. on stat. 1775, 4to, p. 111. 12 Vin. 38. B. 2.*

(1) So if a counsel or attorney consent to be examined, the court will not refuse the reading his deposition. *Maddock v. Maddock, 1 Ves. 62.*

Case 314.

Godwin versus Winsmore, March 10, 1742.

The father of the plaintiff's husband bought customary freehold lands, which were conveyed to him and

D. and the heirs of the father, who dies, after devising the lands to his son in tail, who dies; living *D.* the plaintiff lays the custom for the whole, as her free bench. *Lord Hardwicke* said this was a demand of customary dower out of the trust of a freehold estate, and dismissed her bill.

A Bill was brought by a widow for a customary estate in land at *Worcester*; the husband's father bought the lands, which were conveyed to him and *D.* and the heirs of the father; the father dies after devising the lands to the husband in tail; *D.* survived the husband.

D. and the heirs of the father, who dies, after devising the lands to his son in tail, who dies; living *D.* the plaintiff lays the custom for the whole, as her free bench. *Lord Hardwicke* said this was a demand of customary dower out of the trust of a freehold estate, and dismissed her bill.

[526] The custom is laid for the wife to have the whole lands as her free bench.

LORD CHANCELLOR,

That a wife is not dowable of a trust-estate is now an established doctrine (1).

It is an established doctrine now, that a wife is not dowable of a trust-estate; indeed a distinction is taken by Sir *Joseph Jekyll*, in *Banks versus Sutton, 2 P. W. 708, 709.* in regard to a trust, where it descends or comes to the husband from another, and is not created by himself; but I think there is no ground for such a distinction, for it is going on suppositions which hold on both sides; and at the latter end of the report, Sir *Joseph Jekyll* seems to be very diffident of it himself, and rested chiefly on another point of equity, so that it is no authority in this case.

In *Banks versus Sutton.* Sir *Joseph Jekyll* took a distinction in regard to a trust, where it descends to the husband from another, and not created by himself; but *Lord Talbot* afterwards, in the case of the *Attorney General versus Scott*, determined directly contrary to this distinction.

But there is a late authority in direct contradiction to the distinction above-taken in *Banks versus Sutton*, the case of the *Attorney General versus Scott* before Lord *Talbot, Cas. in Eq. in Lord Talbot's time, 138.*

In *Vernon's case, 4 Rep. 1.* a wife was held not to be dowable of a use, before the statute.

(1) *Colt v. Colt, 1 Cba. Rep. 254.*
Bottomley v. Lord Fairfax, Pre. Cha. 336.
Chaplin v. Chaplin, 3 P. W. 234.
Keynolds v. Miffing and Robinson v. Tongue, cited

ante 1 vol. 604. Dixon v. Saville, 1 Bro. Cba. Rep. 326. Vide Hill v. Adam ante 208.

I think

I think the wife here cannot have the customary dower.

GIDDWIN v.
WINSMORE.

The only case for the plaintiff, is *Otway versus Hudson*; 2 Vern. 583. there it was free bench, and is so called here, but appears plainly to be only customary dower.

Free bench is merely a widow's estate in such lands as the husband dies seised of, not that he is seised of during the coverture, as dower is.

It is a dying seisin of the husband, and not a seisin during the coverture, which intitles the widow to her free bench.

coverture, which intitles the widow to

There were many circumstances in the case in 2 Vern. 583. and it was decreed, on the endeavour of the husband, to get the legal estate surrendered, and refusal of the trustees, and grounded on his will; but as to the general doctrine at the latter end, that is not warranted by the decree.

The demand here is of customary dower out of the trust of a freehold estate, the legal estate standing out in *D. Lord Hardwicke* dismissed the bill, but without costs.

Ex Parte Bennet, March 29, 1743.

Case 315.

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LINGOOD being indebted in several large sums of money to Bennet, and there being some dispute as to the quantum of the debt, Bennet, who apprehended Lingood to be a failing man, came to an agreement with him in 1741, to refer the dispute to arbitration, and articles were accordingly entered into, by which it was agreed, to leave to arbitrators the adjusting the sum that should be due to Bennet, which, when it should be so fixed, Bennet was to take of Lingood, at the rate of eleven shillings in the pound only; the arbitrators awarded 1700*l.* to be due to Bennet, out of which, deducting nine shillings in the pound, in pursuance of the articles, there remained 948*l.* 1*s.* which was to be paid to Bennet by instalments of 25*l.* every quarter of the year. Lingood paid the first, and for the second, gives Bennet two notes payable at a future day, which Bennet accepts, but before they were due, Lingood becomes a bankrupt. Bennet insisted before the commissioners, that he had a right to prove his whole debt of 1700*l.* but the commissioners doubting whether he ought to come in as a creditor for any more than the composition of 948*l.* 1*s.* and refusing to admit him, even for that sum, unless he would give up, for the benefit of the creditors in general, several bonds entered into by Lord Glanrickard, and others, to Lingood, and by him delivered to Bennet as a further security; he petitioned the Chancellor upon both these points, to be let in under the commission for his whole debt of 1700*l.* and to keep the bonds notwithstanding.

Where a creditor for 1700*l.* agrees with his debtor, a failing man, to take eleven shillings in the pound, to be paid by instalments; and the debtor, after the first payment, becomes a bankrupt; Lord Hardwicke was inclined to think the 1700*l.* and not the amount of the composition only, might be proved under the commission of bankruptcy.

Sept 1743
Mont. 72
Adm. of Bennet
3 24 Aug 43

LORD CHANCELLOR,

The question is, Whether Bennet ought to be admitted a creditor for 948*l.* 1*s.* only, which is the sum due upon the composition or for the whole 1700*l.*

Bennet's

Ex Parte
BENNET.

Bennet's acceptance of the two notes from *Lingard*, instead of the money, is a waiver of the particular default in the payment of this instalment: But then the question is, with regard to the defaults which have been made since *Lingard* became a bankrupt.

Where a creditor agrees to take less than his debt, provided it be paid precisely at the day, and the debtor fails of payment, the general rule of equity is that he cannot be relieved.

The reason why commissioners of bankrupt compute interest on debts no lower than the date of the commission, is because it is a dead fund.

Under old acts of parliament, a man was considered as guilty of a crime or tort, in becoming a bankrupt.

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Now the general rule of equity, with respect to compositions of debts, has been rightly laid down, that the court will not dispense with the point of time in compositions; for where a creditor agrees to take less than his debt, so that it be paid precisely at the day, and the debtor fails of payment, he cannot be relieved. *Eq. Cas. Abr.* 28. *sect.* 3. This was in the case * of common creditors and debtors: But the question here is, between a creditor, and a debtor who becomes a bankrupt, by which other persons are interested, the creditors at large.

Commissioners, after a man becomes a bankrupt, compute interest upon debts no lower than the date of the commission, because it is a dead fund, and in such a shipwreck, if there is a salvage of part to each person, in this general loss, it is as much as can be expected (1).

But then the case of a composition differs, for it is broke by the default of the debtor, as he is guilty of a crime and a tort in becoming a bankrupt; and though the genius and turn of bankrupt acts is altered of late, yet it is by the old acts of parliament considered as a wrong (2).

Therefore, whatever the accident is, which happens to the debtor, it shall not affect a creditor, who has compounded to take a less sum than the original debt.

Upon the reason and justice of the thing, it would be very hard, after Mr. *Bennet* had agreed to reduce his debt to eleven shillings in the pound, that he should not be admitted to prove the whole 1700.

Next question, As to the bonds delivered to *Bennet* by *Lingard*, before his bankruptcy.

If it had been a mortgage assigned to *Bennet*, I should have directed the mortgaged premises to be sold, and if the produce arising from the sale had not been sufficient, I would have ordered that *Bennet* should be admitted under the commission, as a creditor for the deficiency.

The doubt is, Whether he can be admitted to prove the whole sum, unless he will deliver up the bonds.

I do not remember this case has ever come before me since I have had the seals.

If they had been joint bonds from the bankrupt and another person to *Bennet*, he might have come in for his whole debt under the commission, without being compelled to deliver up such joint securities, as he was entitled to get in what he could from the co-obligor.

(1) See *Bromley v. Goodere*, ante 1 vol. 77. *Bromley v. Child*, ibid. 259.

(2) *Bromley v. Goodere*, ante 1 vol. 77.

I do not absolutely determine the point now, but will direct the commissioners to inquire what has been received by the creditor Mr. Bennet from these bonds, and to state likewise the nature of them, and to certify the same to the court.

Ex Parte
BENNET.

Bennet versus Lee, March 23, 1742, upon a Petition for a Bill of Review. Case 316.

[529]

LORD CHANCELLOR,

THIS is a case of very great consequence to the practice of the court, it comes before me upon two petitions; one is on the petition of *Francis Lee*, a person of full age, who prays that he may rehear the cause which was determined the 28th of June last, (*vide ante* under the title *Bennet v. Wade*), and that he may likewise exhibit a bill against the plaintiff, one of the heirs at law of Sir *John Lee*, to establish an entail under the will of Sir *John Lee's* father in 1690.

The other is on the petition of *Richard Lee*, an infant, and a party in the cause, who claims under the same entail a moiety of an estate in *Kent*, being gavelkind, with his brother *Francis Lee* the other petitioner, and as to the freehold estates of the late Sir *John Lee*, he claims only a remainder after *Francis*.

The original bill was brought by *Bennet* and others, coheirs of Sir *John Lee*, to set aside the several deeds and conveyances by which Sir *John Lee* disinherited them, upon a suggestion of insanity and fraud, for the contest there related to the sanity and capacity of Sir *John Lee*, and charged doubly, that if not absolutely insane, yet of a weak understanding, and therefore if the court could not set the deeds aside for insanity, yet for fraud and imposition upon a weak man they might.

The decree was founded on the latter charge, and the conveyances were set aside as obtained against a weak and improvident person, and the estate directed to be reconveyed to *Bennet*, &c. and *Francis Lee* was ordered to join in the conveyance; but *Richard Lee* as an infant had a day to shew cause after he comes of age.

The petition is founded on different rights; Sir *John Lee*, father of Sir *John Lee*, made a will in 1690, and after giving an estate-tail to his son, limited to *Francis Lee* the grandfather of the petitioners, the remainder in tail of his *Surry* estate, and the remainder in fee of his *Kentish* estate.

It was insisted by Mr. *Bennet's* counsel, that this remainder to Sir *Francis Lee*, both in the *Surry* estate and the *Kentish* estate, were well barred by a recovery suffered of the former by Sir *John Lee*, the son, on his marriage in 1703, and of the latter in 1718, and that consequently the court will not suffer a new bill in the nature of a bill of review.

Now as to Mr. *Francis Lee*, he has no right by the course of the court to be let in to make a new defence, or to put in a better answer, so that it is only by a bill of review he can be admitted,

S. C. ante 324.
487.

Where parties apply for leave to bring a new bill, upon new matter discovered after a decree, they must shew that it is relevant, for it being new matter will not intitle them to such a bill.

Partridge

W. borne.

5 Russell. 19

Kilbath. New

2 M. Keen

Sept. 1. Shepher

2 M. D. & C. 44.

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LEE.

admitted, and this not unless there is new matter discovered since the last bill, and if he brings himself within this rule, to be sure he is intitled.

Two questions will arise as to him.

First, Whether the entail in the will of 1690 is new matter, unknown to him at the time of the original cause, and came to his knowledge since.

Secondly, If it did, whether so material, as to induce the court to put the parties to the expence of a new hearing.

Now it appears to me plainly, that he was acquainted with this, antecedent to the publication of the cause; for that the will was known to him is admitted by himself in his answer, and taken notice of in the bill itself.

The only way his counsel avoid it is, that though he had notice of the right under the will, yet he had no notice of the settlement and recovery on Sir *John Lee's* marriage; this is no answer, for it was incumbent upon Mr. *Francis Lee* to look out for the limitations under the settlement on Sir *John Lee's* marriage; for as there was a limitation standing out in *Francis Lee*, whether it took effect now or hereafter, it was very proper he should make use of this title, against the heirs at law of Sir *John Lee*, because such limitation was a sufficient bar to them, and their bill brought in contradiction to this very title claimed by *Francis Lee* under the will.

In all these cases, where parties apply for leave to bring a new bill upon new matter discovered after a decree, they must shew that it is relevant; for the court will not, merely because it is new matter, direct a new bill to be brought, where it will be entirely vain and fruitless.

Therefore, upon a former petition, I directed the recovery to be looked into, that *Francis Lee's* counsel might have shewn some errors in it, which they have not been able to do.

But then it is said Sir *John Lee* was insane at the time of the recovery suffered of the *Kentish* estate.

To let Mr. *Francis Lee* bring a new bill upon this footing would be most extraordinary.

[531]

I will lay it down so strong, that *Francis Lee* had better lose the estate if he had ever so good a right, than the Public suffer from such a precedent.

Where a party in a first cause has examined a great number of witnesses to establish a particular point, the court will never suffer him in a second, to contradict what he attempted to

For, in the last cause he brought a cross-bill upon the very point of the sanity of Sir *John Lee*, and examined a multitude of witnesses to prove him sane: and to let him in the next day, and in the second cause to contradict what he attempted to prove in the first, would introduce all the perjury in the world: for where the same point came in question, and where he endeavoured to prove in direct contradiction to what he does now, is a practice the court will never suffer.

proved in the first, as it must necessarily introduce perjury.

The great difficulty is with regard to *Richard Lee* the infant.

For

For he comes upon the foundation of that right, an infant has, to make the best defence the nature of the case will allow : for when infants come of age they are certainly intitled to put in a new answer, and to make a better defence if they can.

BENNET v. LEE.

Infant when of age intitled to put in a new answer, and if

they can to make a better defence (1).

This rule is founded upon the reasoning of all other courts, where the parol is allowed to demur, till the infant comes of age.

For at law where even the suit is brought by an infant as demandant, the courts in some cases will admit the parol to demur, but then they make a difference between droitures, and possessory actions : *vide* the rules of the common law as to the *parol demurring*, in *Markal's case*, 6 Co. 3.

At law the courts in some cases will admit the parol to demur, even where the suit is brought by the infant as demandant.

In equity too, even where the infant has been plaintiff, the court has in some few instances given him a day to shew cause, as in the case of *Sir John Napier v. Lady Effingham*, but then there were some extraordinary circumstances*.

This court has in some few instances given an infant, where he was plaintiff, a day to shew

cause, but it must be on extraordinary circumstances.

There is no such thing as a difference in this court between writs of right and possessory actions, for the decrees here are the same, and one has not more force, or is more binding than the other.

It has been objected, that the infant comes too early, and ought to stay till he is of age.

[532]

I have been looking into a note I have of *Sir John Napier's case*, by which it appears that Lord Chancellor King, in giving his opinion, agreed with *Sir Joseph Jekyll* as to *Sir John's* putting in a better answer, but disagreed with him as to amending the bill, and said, as he was of age, he might be at liberty to rehear the cause.

The present case differs, for here the person comes before he is of age, and prays he may be allowed to put in a better answer now.

I am of opinion, provided there is a foundation for it upon the merits, that the infant before he comes of age is proper in applying to put in a better answer (2).

An infant is proper in applying to put in a better answer, where he might

not be able to come at the same evidence when he is of age, as the fact he wants to examine to is of long standing, and the witnesses consequently very old, and may die before he arrives at 21.

* The plaintiff *Sir John Napier*, an infant, exhibited his petition to Lord Chancellor Parker, for leave to bring a new bill, shewing that his cause had been mismanaged by his former solicitor, and making out the same by affidavits ; the court gave him leave to bring a new bill.

The defendant *Lady Effingham* appealing from the order to the House of Lords, she was let into the possession of the premises, which she claimed under a conveyance from *Sir Theophilus Napier*, her first husband and uncle of *Sir John*, who brought a bill to be relieved against this conveyance as unduly obtained ; but they gave leave to the plaintiff to shew cause within six months after he came of age. *Sir John Napier v. Lady Effingham*, 2 P. Wms. 401.

(1) *Fountain v. Cain*, 1 P. W. 504.
Napier v. Effingham, 2 P. W. 401.

(2) 1 P. Wms. 737.

I do

BENNETT v.
LEE.

I do not say this is of course, but it must depend upon circumstances here; if the infant did not put in a better answer now, he might not perhaps be able to come at the same evidence when he is of age.

Indeed if it depended upon deeds only, which would be forthcoming as well when he is of age, as now, it would be otherwise; but the witnesses to Sir *John Lee's* insanity, swearing to a fact of very long standing, must be advanced in years, and may very probably die before he comes of age.

Besides, deferring it would be putting the infant's estate to the hazard; for though I do not say it will happen in this case, yet a person who is put in as a receiver, may imbeizil, or prove insolvent.

I shall now come to the merits.

If it rested singly upon the entail, and Sir *John Lee* was *compos mentis* when the recovery was suffered, it would be very wrong to let the infant keep up this contest, where no fruit is to be expected from it.

But it is insisted that Sir *John Lee* was *non compos*, or if not quite insane, yet so weak and of such a mean capacity, that he was in no part of his life capable of suffering a recovery.

Now the infant has a right to say, my interest has not been consulted in this cause; for I ought to have been allowed to join with the plaintiff, and to have insisted on carrying the incapacity of Sir *John Lee* so far back, as to over-reach the recovery of the estates in 1703 and 1718.

[533]

Therefore he is justified, in saying, that his guardian has mistaken his case entirely, and I cannot in justice refuse him putting in a better answer, and making the best defence he can.

Where one party sets up a title inconsistent with the title set up by another, though he fails in his own claim, yet he may appear to have a right to something under the other's claim, and in that case the court will not deprive him of it.

Now this will introduce Mr. *Francis Lee's* right; for though he cannot amend his answer, or put in a new one, or bring a new bill, yet if, upon a defence set up by another person, it should come out to be the justice of the case, that the entail of the *Kentish* estate is still in being, why then Mr. *Francis Lee* will by the custom of *Kent* be intitled to a moiety: for there are many cases where one party sets up a title inconsistent with the title set up by another party, and though he fails in his own claim, yet he may appear to have a right to something under the other's claim; and this court cannot consistently with justice deprive him of it.

I will not absolutely determine this point now, but will suspend that part of the decree which directs Mr. *Francis Lee* to join in the conveyance of the *Kentish* estate until this question is settled, and dismiss Mr. *Francis Lee's* petition as to every thing else (1).

(1) " His Lordship doth order, upon the petition of *Richard Lee* the infant, that he be at liberty to amend his answer to the original bill, or to put in a new answer thereto: and his Lordship doth order, upon the petition of *Francis Lee*, that the performance of that part of the decree, whereby the

" said *Francis Lee* is decreed to join in a conveyance of the *Kentish* estate, &c. be suspended as to the said *Francis Lee*, until the cause shall come again to be heard on the new defence to be made by the said *Richard Lee* the infant." *Reg. Lib. A. 1742. fol. 278.*

Gould versus Tancred, March 23, 1742.

Cafe 317.

The plaintiff being a mortgagee in possession of Mr. Tancred's estate, brought a bill against him to redeem, or might be foreclosed; and it being referred to a Master the account, he made his report, which was confirmed in the year 1736. The defendant petitions now for review, upon three suggestions: First, That the Master the account has not made any rests, or sunk the principal mortgage. Secondly, That there are three years in the account; and Thirdly, That there is matter come to knowledge, subsequent to the Master's making his report, that existed at the time.

It being referred to a Master to take the account between a mortgagor and mortgagee under a bill of foreclosure, his report was confirmed in the year 1736. Lord Hardwicke dismissed the defendant's petition for a bill of review, as it appeared the defendant was before the Master,

gent, attorney and solicitor attended the settling the account on his behalf before the Master, and the party.

CHANCELLOR,

is a very unfavourable application when the Master's report has been confirmed so long, and where the defendant might have excepted to the report, upon every one of the suggestions which he now makes for the bill of review.

It has been said by his counsel to strengthen the application, that the defendant, being an unfortunate man, has lain in prison part of the time, and forced to leave the kingdom for

is thrown in to move compassion, for all persons in the defendant's case, who are incumbered, are liable to such accidents; and if I was to give any weight to it, a creditor would suffer very great hardships, and the saying inverted, for *a creditor would become a slave to the borrower.*

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the defendant's agents, attorney, clerk in court, &c. attended the settling the account before the Master, which was confirmed by the party, or there would be no end of controversies: and the whole tendency of this application is, that all may be said again: this makes me say it is a most unfavourable application; but however, if justice is with the defendant, it ought to be granted.

The petition is upon three grounds:

1. That the Master has not made any rests, or sunk the principal.

2. That the Master has not followed the very true rule of the court in directing an account between a mortgagor and mortgagee is, that wherever the gross interest received exceeds the interest, it shall be applied to sink the principal (1).

3. That this is often attended with great hardships to mortgagors, where, as in this case, the sum was large, 4000*l.* principal.

Where the sum is large and the mortgage is principal, the mortgagor is obliged to make annual rests; but the Master is not obliged for a small interest to apply it to sink the principal, nor is it an invariable rule, that in taking such account must make annual rests.

1) *Robinson v. Cumming*, ante 410.

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cipal, and the mortgagee forced to enter upon the estate, and could only satisfy his debt by parcels, and is a bailiff to the mortgagor without salary, subject to an account; and therefore truly said, the Master is not obliged, for every trifling small exceed of interest, to apply it to sink the principal: nor do I know that the court has ever laid it down for an invariable rule, that the Master must always in taking such account make annual rests.

The leave of the court must be asked before a bill of review for new matter can be filed; otherwise, if brought to reverse a decree upon error appearing on the face of it.

A defendant may plead the decree, and demur against opening the enrolment to a bill of review brought for error apparent, and on the plea and demurrer the court will judge, whether there are grounds for opening the enrolment.

If a bill of review be brought to reverse a decree, upon new matter, in such case the plaintiff in the bill of review must have the leave of the court for filing such bill; but there is no need of leave, if the bill of review be brought to reverse a decree upon error appearing on the face thereof; *vide* Lord Bacon's *Ordinances* (1).

I take it, this has always been understood to be the rule; and the course of proceedings shew it.

For when a bill of review is brought for error apparent, the constant method is, for the defendant to put in a plea and demurrer, a plea of the decree, and a demurrer against opening the enrolment (2).

So that in effect, you cannot bring a bill of review, without having the leave of the court in some shape; for if it is for matter apparent in the body of the decree, then upon the plea and demurrer of the defendant to the bill, the court judges, whether there are any grounds for opening the enrolment, if it is for matter come to the plaintiff's knowledge after the pronouncing the decree, then upon a petition for leave to bring a bill of review, the court will judge if there is any foundation for such leave.

The second ground is, that there are three years omitted in the account by the Master.

Now this is likewise error apparent, and might have been excepted to, and therefore falls within the same rule with the other.

The third ground is, that the matter came to his knowledge subsequent to the Master's making his report.

And this is a proper ground for a bill of review, supposing the evidence came up to it, but it turns out quite otherwise; this being so, the petition must be dismissed.

(1) *Wortley v. Birkhead*, post. 3 vol. 811.

(2) *Vide Dancer v. Ewett*, 1 Ver. 392. post. 3 vol. 627.

Woodhouse versus Shepley, et e contra, March 17, 1742.

Case 318.

THE original bill was brought by *Hannah Woodhouse* to be relieved against a bond, obtained from her by the defendant upon this case.

Lord Hardwicke of opinion, that on the original bill the plaintiff was intitled to

be relieved, and declared, though none of the circumstances singly might prevail on the court to overturn her bond, yet they were sufficient altogether; but the chief of them was; the encouragement this might give to disobedience, and the fraud on parents; and on the whole decreed it to be delivered up to be cancelled.

The defendant who was a taylor by trade, and entitled to a small real estate of about 14*l.* *per ann.* in the year 1730 made his addresses to the plaintiff, who was then about the age of 26 years, and was the daughter of a man who was esteemed in the neighbourhood to be a person of substance, and who could give her about 500*l.* for her fortune: the courtship had been carried on sometime before it came to her father's knowledge, who, as soon as he was acquainted with it, declared a great dislike of the match, and forbid the plaintiff giving the defendant any encouragement; notwithstanding which, the courtship was carried on in a clandestine manner till *January 1732*, when he defendant met the plaintiff at *Macclesfield*, a market-town in the neighbourhood, and there at an alehouse the following bonds were executed, no body being present except the witnesses, who were two strangers, and were called in for that purpose, *videlicet*;

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A bond from her in the penalty of 600*l.* with condition that if the above bound *Hannah Woodhouse* do, on or before the expiration of 13 months after the decease of her father *Robert Woodhouse*, according to the usage and ceremony of the church of *England*, espouse and marry the above named *Ralph Shepley*, if the above named *Ralph Shepley* will thereunto assent, and the laws of this realm permit the same, or if it shall happen the said *Hannah Woodhouse* shall not nor will not marry and take to husband the said *Ralph Shepley* as aforesaid, but shall happen to marry with some other person, then the said *Hannah Woodhouse* shall and will well and truly pay or cause to be paid unto the said *Ralph Shepley* the sum of 500*l.* of lawful *British* money, at or immediately after failure of such marriage; but if it shall happen that the said *Hannah Woodhouse* shall die before the time limited and appointed for the said marriage, then the said *Hannah Woodhouse* shall leave and give the said *Ralph Shepley* 10*l.* as a token of her love, to buy him a suit of mourning with, then this obligation to be void, or else shall remain in full force.

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A bond from him in the like penalty, "with condition, that if the above bounden *Ralph Shepley* do, on or before the expiration of thirteen months after the decease of *Robert Woodhouse*, father of the above-named *Hannah Woodhouse*, according to the usage and ceremony of the church of *England*, espouse and marry the said *Hannah Woodhouse*, if the said *Hannah Woodhouse*

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“ will thereunto assent, and the laws of the realm permit, or if
“ it shall happen the said *Ralph Shepley* shall not nor will not marry
“ and take to wife the said *Hannah Woodhouse* as aforesaid, but
“ shall happen to marry with some other woman, then the said
“ *Ralph Shepley* doth hereby covenant and agree to forfeit, sur-
“ render and yield up unto the said *Hannah Woodhouse* for her
“ own use all his estate real and personal in *Macclesfield* park, and
“ *Somerford* booths, or elsewhere by sea or land; but if it shall
“ happen that the said *Ralph Shepley* shall die *fore* the time limi-
“ ted and appointed for the said marriage, then the said *Hannah*
“ *Woodhouse* is to have to her own use one half of all the said
“ *Ralph Shepley's* estate both real and personal that he shall be
“ possessed of at the time of his decease, then this obligation to be
“ void, or else to remain in full force.”

An indorsement on the back of *Shepley's* bond: *Memorandum*,
“ that before the sealing of this bond that *Ralph Shipley* doth
“ promise, covenant and agree that he will settle and assure the
“ within named *Hannah Woodhouse* a yearly dower, according
“ to what portion she shall have, and make her a good assur-
“ ance as the law directeth, either of lands, money or living,
“ that shall please her; if this said *Hannah Woodhouse* shall have
“ child or children, then she shall have one half of his estate,
“ and the child or children the other half that he shall die pos-
“ sessed of, or that may by any means belong to him, or his in-
“ heritance, that may either fall to him by sea or land; and if
“ this said *Hannah Woodhouse* shall marry this *Ralph Shepley*; and
“ have no children by him, then she shall pay to *Sarah Shepley*
“ 20*l.* of lawful money as a legacy, and then all his lands, liv-
“ ings, goods, chattels, money and any thing that shall ever
“ belong to him, or that ever did in his life-time, that has
“ not been received, she shall have and peaceably enjoy, and
“ take for her own use and at her own disposing both in her
“ life and at her death, unto which I have put my hand.
“ *R. S.*”

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Upon the examination of the witnesses to the bonds it ap-
peared they differed in their account of the execution, one say-
ing the bonds were read over before execution, the other that
they were not; one that they were exchanged, the other that both
of them remained in the custody of the defendant; and in fact,
at the time the answer was put in, they were both in the hands
of the defendant: after this transaction, the execution of these
bonds remained unknown, and the intercourse was continued
till *May* 1736, when the plaintiff's father died, who by his will
left her a fortune of about 340*l.* the 13 months expired, and then
the plaintiff filed the original bill to be relieved against her bond,
and dying soon after, the cause was revived by the present plain-
tiff her administrator.

The cross-bill was brought by *Ralph Shepley* to have satisfac-
tion for this bond out of the assets of *Hannah Woodhouse*, alledg-
ing he was always ready and willing to have married her, but was
prevented from having any access to her by her brothers.

Mr. Attorney General and others for the plaintiffs insisted, that this bond ought to be delivered up, and relied first upon the circumstances of fraud attending the execution of these bonds, the inequality of the circumstances of the parties, and the circumstance of both the bonds being now in his custody.

Secondly, That here was no breach of the condition, in regard the plaintiff never married any other person, and because he had not shewn any tender on his part, or refusal on her part, to perform the contract.

Thirdly, That supposing the condition was broken, and the bond fairly obtained, yet that the bond was of such a nature, as that a court of equity for public considerations, and the general inconveniencies that would attend the permission of such sort of contracts, ought to set it aside; and it was compared to marriage brocage bonds (1); bonds obtained by solicitors from their clients (2); bonds from young heirs, &c. that it was in restraint of marriage, tends to encourage improvident matches, and disobedience to parents, and would be void both by the civil and canon law; and the cases of *Kry versus Bradshaw*, 2 Vern. 102, and *Baker and his wife versus White*, 2 Vern. 215. were cited.

Mr. Brown and other counsel for the defendant insisted that there was no circumstance of fraud in obtaining the bond, sufficient for a court of equity to set it aside: that she was of full age; that it was a suitable match; that the obligations were mutual, which shewed no design of fraud: that the bargain appeared to be most beneficial on her side; that as to the breach of the condition, there is no occasion to prove a tender at law, for a plaintiff may declare generally upon the bond, and the defendant must have pleaded performance, payment, or a tender and refusal, and from the circumstances it appears he was always ready to have performed his contract: that as to the necessity of marrying, although the condition is inaccurately penned, yet upon the whole it appears to be the intention and agreement of the parties, that the bond should be forfeited if she refused to marry the defendant: that there was nothing improper or unreasonable in this agreement; nor doth this case fall within the inconveniencies in the cases which have been mentioned; for being of full age she had a right to dispose of herself, and if she parted with the liberty of marriage, it was for a valuable consideration; that this was a contract for the breach of which (if there had been no bond) damages might have been recovered at law: which likewise the ecclesiastical courts would enforce, consequently neither unequitable nor improper, nor can the adding a penalty vitiate the contract itself: that such penalty ought to be considered as the stated damages settled betwixt the parties themselves: that the arguments drawn from the restraint on marriage, the promoting improvident matches, and disobedience to parents,

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(1) *Smith v. Aykwell*, post. 3 vol. 566. (2) *Drapers' Company v. Davis*, ante 295.
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prove too much, because they tend to shew that all such contracts are void in themselves, which they certainly are not. The case of *Atkins v. Farr*, vide 1 *Tra. Alk.* 287. was cited as in point, before Lord *Hardwicke*, Feb. 28, 1739, in that case the defendant *Farr* had given the plaintiff's daughter in her life-time a bond in the penalty of 500*l.* conditioned for the payment of 500*l.* if he did not marry her within the twelve-month from the date of the bond; the defendant did not marry her within the time, but clandestinely got the bond from her; she died soon afterwards, and the plaintiff her mother took out administration to her daughter, and brought a bill for the 500*l.* and insists that upon the breach of the condition the bond became absolute, and the 500*l.* veited in the daughter, and was transmissible to the plaintiff as her representative; the defendant insisted that the obligee was an orange girl at the playhouse, and a common strumpet, that it was *turpis contractus*, and ought not in a court of equity to be carried into execution, but failed in his proof: the Chancellor was of opinion that it was a good bond, and the penalty in the nature of stated damages between the parties; and therefore decreed the defendant to pay the 500*l.* to the plaintiff as representative of her daughter the obligee.

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LORD CHANCELLOR.

This is a new case, and in the decree which I shall make I shall not found myself on any circumstances of actual fraud appearing in it; for though there may be some suspicion arising from the manner of the execution of this bond, yet I think there is not sufficient foundation to decree on the actual fraud; the parties being both of full age, the bonds mutual, and their circumstances not greatly unequal.

And as I shall go upon the nature of such bonds, I shall begin with mentioning the points I give no opinion upon at present.

First, I do not give any opinion what would be the judgment of this court on such bonds entered into by parties both equally *sui juris*, having an absolute power over themselves and their fortunes, and where the parents are not living; neither do I give any opinion that such bonds would be void in all cases between persons not *sui juris* to all purposes, tho' this case and *Atkins v. Farr* fall under very different considerations, for that was of the first kind before mentioned; but there was also something of the *premiu pudoris*, and his defence was her bad character (1), which was not proved: tho' indeed that case is contrary to the general rule of the civil law: in the present case I am of opinion that I ought not to decree satisfaction of this bond on the cross-bill, but direct it to be delivered up to be cancelled on the original bill; and the points upon which I found my judgment are these.

That bonds of this sort, where parents are living, are liable to great fraud and abuse; that to decree in favour of such a bond

(1) Vide *Clarke v. Petiam*, ante 333. 337. and the references at the end of the case.

would be a great encouragement to persons to lie upon the catch to procure unequal marriages, against the consent of parents, and though they dare not solemnize the marriage in the life-time of the parent, but only engage the affection, and draw the unfortunate person into a bond to forfeit their whole fortune, as is the case here, yet it is of very dangerous consequence, and tends to bring great misfortunes into families.

Another principal ground of my opinion is, that this tends to encourage disobedience to parents, and indeed is a *fraud* and imposition on the parent, though there is no actual fraud as between the parties.

In this case she lived with her father, and was dependent on him for her portion, and he considered her as a child to be advanced, and though a parent has no power by law to prevent the marriage of his child, yet it is expected that she should take his consent and approbation, and by the laws of some countries that is made necessary.

* It is therefore a *fraud* on the father, who thinks his child has submitted to his opinion of the match, and, in that opinion, makes a provision for her, to advance her in marriage, which, had he known of the bond, he would not have done, or might have done in such a manner as would have prevented the marriage; it is therefore *in fraud* of the father's right of disposing of his fortune among his children according to their deserts, and may be compared to the cases of bonds given before marriage to return a part of the portion (1); for there is no fraud in those cases between the contracting parties, but on the parents or friends of one of them, who are deceived by settling lands equal to the portion that appears to be given, and for that reason such bonds have been set aside: Another ground of relief, is the penalty; for this differs greatly in the reasonableness of it from executory promises, where the jury can consider the whole case, and whether the party has been unwarily drawn into such a contract or not, and the change of circumstances since the execution, and give damages accordingly; and though it has been truly said, that a great alteration of circumstances or character, would be a ground of relief here, yet that cannot be offered at law against the penalty, and bonds tending themselves to prevent such circumstances from being properly considered; bonds of this sort therefore deserve less favour upon this account, though perhaps that alone would not be sufficient to set them aside.

As to the cases cited, none of them come up to this; 2 *Verr.* 402, the reason of that case was, the inequality of circumstances, and the party's being a servant, and the danger of admitting such transactions into families; *Baker v. White*, 2 *Vern.* 215. went upon the general restraint of marriage.

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Tho' a parent has no power to prevent the marriage of his child, yet his consent is expected, and by the laws of some countries necessary. Compared to the cases of bonds given before marriage to return a part of the portion, where the fraud was not between the contracting parties, but on the parents of one of them, who being deceived in this respect, has induced the court to set aside such bonds.

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(1) *Peyton v. Bladwell*, 1 *Vern.* 1 P. W. 121. *Turton v. Benson*, 1 P. W. 40. *Redman v. Redman*, *ibid.* 348. 496. *Debenham v. Ox*, 1 *Ves.* 277. *Cole v. Dale*, *ibid.* 475. *Lamlee v. Han-* *v. Gibson*, *ibid.* 507. *Pitcairn v. Og-*
den, 2 *Vern.* 499. *Hamilton v. Mobin*, *Lourne*, 2 *Ves.* 375.

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There are some circumstances further attending this case, which makes it unfavourable: The bonds are executed in an ale-house, where she had no friend; two strangers are called in to witness it; and the witnesses differ as to its being read over: The bond executed by him was, at the time of her death, in his hands; one witness says, it was left in his hands at the time of the execution, and there is no evidence how it came into his hands; he says, by his answer, she gave it him, but even that is an evidence of the great power he had over her, and if there was no mutual obligation, there had been no colour to support this bond.

I am therefore of opinion, that on the original bill the plaintiff ought to be relieved; and I say the same in this case as Lord Cowper did in *Floyer v. Lavington*, 1 P. Wms. 268. that though none of these circumstances, singly, might be sufficient to overturn this bond, yet, altogether, they are so; but the chief of them, and which has great weight with me, is the encouragement this might give to disobedience, and the fraud on parents.

Lord Hardwicke doubted, whether a breach of the condition could have been assigned without Shepley's shewing a tender of himself, by writing, or sending, and thought his assent must have been an actual proposal, and the first act.

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* As to the case made by the cross-bill, I am not very clear that here is a sufficient breach of the condition; the breach insisted on must depend on the first part, for in the second it is conjunctive, and the payment of the 500*l.* is connected with that; and if it rests on the first part, the whole penalty is forfeited, not the 500*l.* and, it is pretty strange to think, that it was agreed, if she married another, that she should lose 500*l.* if she only refused to marry the plaintiff, she must lose 600*l.* I therefore must have decreed the 600*l.* penalty, which would have been very extraordinary. As to the tender, I doubt whether a breach could have been assigned, without his shewing a tender of himself, by writing, or sending; though, by the circumstances of this case, a personal tender might have been excused, and I should think the assent of the man must have been in this case, an actual proposal, and the first act, like the cases put by Lord Coke upon frank-marriage, where the modesty of the sex is considered by the common law.

As to costs: I think it would be too hard to make him pay them, as here is no actual fraud, and he might think he had acted fairly by her; since therefore I decree this chiefly on publick and general considerations, there shall be no costs on either side.

Lord Chancellor decreed the bond to be delivered up to be cancelled, and dismissed the cross-bill.

Case 319.

Harvey versus Philips, April 14, 1743. On Exceptions.

A purchaser made an objection to a title for want of a deed, which had been introlled at a public office, but could not be found; a copy of it, taken in 1652, and held to be a true one by five witnesses, produced in court: Lord Hardwicke of opinion, this would have been sufficient, even without an attestation.

IT had been referred to a Master, to see whether a good title could be made to a purchaser; the Master reported in favour

of

of the title ; several exceptions were taken, and among the rest, that a deed of bargain and sale, said to be inrolled at the chapel of the *Rolls*, and which is very material to make out the title, is not to be found there.

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A copy of this very deed, taken at the *Rolls* in 1632, and attested to be a true copy by five witnesses, was produced now in court.

LORD CHANCELLOR,

If the original had been in the hands of a private person, there might have been some doubt ; but where it appears to have been lodged in a public office, and the copy is so very ancient, I am of opinion that it would have been sufficient, even if there had been no attestation to the copy : *Vide 1 Mod. Medico v. Joiner* 4. and 6 *Mod.* 225. the two last sections in the case of *Stanyen v. Davis* (1).

(1) *Vide Lady Holcroft v. Smith*, 2 *Freem.* 259, 260.

Wood versus Freeman, April 15, 1743.

Case 320.

AN exception was taken by a sequestrator to a Master's report, because he had not allowed him six shillings and eight pence a day for his trouble.

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LORD CHANCELLOR,

I do not remember that six shillings and eight pence is an absolute stated fee, to all sequestrators, whether the effects seized under the sequestration are large or small ; and as the sequestrator, in this case, has not got in 40*l.* in almost two years, I think the gross sum the Master has allowed him, is sufficient for his trouble.

A sequestrator is not intitled to a stated fee of 6*s.* 8*d.* a day for his fee.

The Marchioness of Blandford versus The Dowager Dutchess of Marlborough and others, April 21, 1743. Case 321.

A Bill was brought to have certain manors, lands, &c. part of the trust-estate of the first Duke of *Marlborough*, and settled upon the Marchioness in marriage with the Marquis of *Blandford*, made up a clear 3000*l.* a year out of the assets of her late husband, whilst he was in possession, or out of the assets of *Harriot*, late Dutchess of *Marlborough*, or out of the assets of the present Duke.

S. C. 2 *Vef.* 502. cited. Where a person had a power to make a jointure without any deduction for any charges imposed, or to be imposed, parliamentary or otherwise ; this does not mean

only such as are fixed and certain, but the *land-tax*, though a fluctuating one, is clearly within the power (1).

(1) So *Brewster v. Kitchell*, 1 *Salk.* 198. *Lord Raym.* 317. *Hopwood v. Barefoot*, 20 *Fin.* 161. pl. 7. *Hodgworth v. Crawley*, ante 376. *Bradbury v. Wright*, Dougl. 602. *Contra Green v. Marygold*, 8 *Fin.* 411. *Tyrconnel v. An-*

cafter, 2 *Vef.* 500. *Amb.* 237. S. C. *Da Costa v. Villareal*, 1 *Bro. Cha. Rep.* in note. *Vide Harvey v. Harvey*, ante 1 vol. 562. *Nicholls v. Leejon*, post. 3 vol. 573.

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The case arises principally upon the will of the first Duke of *Marlborough*, made the 19th of *March* 1721, this was a very strict settlement of his real and personal estate; he made the persons who were then in being tenants for life only, of the whole, among which were *Harriot*, late Dutchess of *Marlborough*, and her son, the Marquis of *Blandford*.

There were certain powers given to each particular tenant, and one of the powers is specially given to the Marquis of *Blandford*, to make a jointure in his mother's life-time, not exceeding 4000*l. per ann.* and this to arise out of land which he was seised of, or out of personal estate when laid out in land.

After the death of *John* late Duke of *Marlborough*, Lady *Gedolphin* was in possession, and the Marquis of *Blandford*, her son, in her life-time, married the present plaintiff, and by articles of marriage, he covenanted to settle out of the estate of the late Duke of *Marlborough*, to the yearly value of 3000*l.* for a jointure, over and above all reprises, pursuant to the power given him under the will of the late Duke of *Marlborough*.

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July 7, 1729, A settlement was executed, or deed of appointment of the lands, which recites the will of the Duke of *Marlborough*, the letters of denization of the plaintiff, to enable her to take lands; recites the consideration of marriage, and covenants that the lands shall produce to the plaintiff 3000*l. per ann.* clear of all reprises.

The plaintiff entered into the lands after the death of the Marquis of *Blandford*, and continued in possession till she married Sir *William Wyndham*, who then received the rents and profits till the time of his death, but have not produced 3000*l.* a year; and *communibus annis* there has been a deficiency of 600*l.*

The first question, What is the true construction of the power?

Secondly, What is the construction of the articles?

Thirdly, Whether, upon the proofs, there appears to be any deficiency in the annual value of the lands settled in jointure.

Fourthly, Whether the plaintiff has a right to have this deficiency made good against the several defendants.

The words of the power: Provided also, and my will and meaning is, "That Lord *Rialton* shall in his life-time be empowered by any deed or deeds, in the presence of two witnesses, or by will, &c. to settle upon any woman, &c. he shall marry, for her jointure, not exceeding 4000*l. per ann.* without any deduction or abatement for any taxes, charges or impositions, imposed, or to be imposed, parliamentary, or otherwise, subject nevertheless to leases in being at the time of such jointure made."

I think both sides are mistaken in the construction of the power.

For the plaintiff's counsel carry it too far, in extending it to be a clear rent-charge, and have insisted upon deducting for every little sum laid out in manuring, or any way relating to the land.

And,

And, on the other hand, the defendant's counsel have narrowed it too much, by insisting *taxes and impositions* ought to receive a limited and restrained sense, and mean such taxes as are fixed, and certain in their nature, which the land-tax is not, being a fluctuating one.

I think the land-tax clearly within the power, for it would be very strange, when there are the words, imposed or to be imposed, that the principal, and most considerable publick tax should be intended to be excluded. *Vide Brewster v. Kidgill*, 2 *Barthw* 438. 1 *Salk*. 198. 5 *Mod*. 368.

There was a cause in this court between the *Bishop of Oxford* and *Wife*, in 1698, where the bishop covenanted, that he would pay all charges ordinary and extraordinary.

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not subject himself to the land-tax, because he cannot bind his successors; otherwise in the case of a common person, because he can bind his heirs.

A bishop by covenanting to pay all charges, ordinary or extraordinary, does

Lord Somers consulted with Lord Chief Justice Treby, and Mr. Justice John Powell, who were both of opinion, the bishop was liable to pay the land-tax; and the decree was according to their opinion; but then the judges said, if it had been in the case of a common person, it would have been otherwise, because he can bind his heirs, but a bishop cannot bind his successors.

Now a perpetual tax has, and may be laid upon land, as for repairing bridges, &c. but tho' certain and permanent when fixed, yet not certain at what time it may be so fixed.

The best rule is to construe the power as referring to such taxes as were in being at the time the articles were executed.

The jointure is not to exceed in the whole the annual value of 4000*l*. and, in my apprehension, the value of the land is to be estimated as it stood at the time of the power: If, by any accident, after the execution of the power, there should have been an excess, it would be for the benefit of the jointress: By parity of reason, if there should be any deficiency, by inundation or casualties, the jointress must acquiesce under it; to construe it otherwise, would make these powers defultory.

If by any accident, after the execution of a power, there is an excess in the lands settled on a jointress, she shall have the benefit; *et contra*, if there is a deficiency by casualties, she must acquiesce under it.

Upon the *first question*, therefore, the measure of the charges the jointured estate is to be freed from, must be taken from the valuation at the time of the execution of the power, and of such charges as were then in being.

The *second question* is, As to the construction of the articles.

A great inaccuracy in the drawer of the articles, for want of pursuing the power; may even the articles and settlement have not so much as the same words, but differ in many places: and yet, I think, they ought both to be construed so as to make them consistent, and by this means, I shall have some reasons for what I say, and some foundation to stand upon.

On the part of the defendant, an advantage has been attempted to be taken from this expression, that the jointure should be clear of *reprises*.

Now

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Now the word *reprises* is of a very uncertain signification, and ought to be construed *secundum subjectam materiam*.

Reprises must be construed *secundum subjectam materiam*.

Cowell's Interpreter, and *Blount's Law Dictionary*, explain the meaning of *reprises*; but *Spelman* has not the word in all his *Glossary*.

For the genuine meaning of the word, *Vide Cowell's Interpreter*, and *Blount's Law Dictionary*: But the fees of stewards or bailiffs mentioned there as an out-going, must mean the fees of stewards or bailiffs of the crown: Sir *Henry Spelman* is a far better antiquary and critick than either of them, and he has not the word in all his *Glossary*.

The articles begin with a recital of the power, and the intended marriage, and the meaning of this inaccurate drawer, under the word *reprises*, was to take in taxes, charges or impositions, imposed or to be imposed, parliamentary or otherwise, according to the subject matter, and pursuant to the power to which it refers.

Nothing is clearer, than that the Marquis intended to settle 3000*l. per ann.* free from all taxes whatsoever.

Articles are considered in this court as minutes only, which the settlement may explain more at large.

And if the construction of the articles should be doubtful, from the uncertain signification of the word *reprises*, yet taxes inserted in the settlement may explain the meaning; and this way of reasoning will hold better in this court, because articles are considered here as minutes only, and the settlement may afterwards explain more at large the meaning of the same parties.

As to the *third* and *fourth question*, relating to the deficiency, though the plaintiff took a collateral covenant from the Marquis of *Blandford*, that the land should continue of the value, yet this has nothing to do with the power; for to make a covenant amount to an execution of the power, is not agreeable to the rules of construction in this court.

No difference between articles unexecuted *in toto* or in part, for the ground the court goes upon is, what is covenanted to be done, is considered as done.

Therefore the plaintiff must rely upon the articles, and if a deficiency appear there, they are *executory*, and not executed, and there is no difference between articles unexecuted *in toto* or in part only, for all the cases go upon this ground, that what is covenanted to be done, is considered as done; the ruling case in this respect, is *Coventry versus Coventry*. *Vide Max. in Eq.* at the latter end (1), and *Lady Clifford* and *Lord Burlington*, 2 *Vern.* 379.

The inattention of laches of a married woman cannot hurt her right.

The plaintiff's counsel have insisted, she is intitled to be relieved under the head of mistake (2), and I think very rightly, for the inattention or laches of a married woman, cannot hurt or affect her right (3).

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As this is my opinion upon the whole,

I must declare that the plaintiff by virtue of the power under the Duke's will and the marriage articles of the 13*th* of *April*, 1729, "is intitled to such a jointure out of the trust-estate subject to the said power, as at the time of executing "the said articles was of the yearly value of 3000*l.* free from

(1) 2 *P. W.* 222. *S. C.* *Str.* 595.
S. C. 9 *Mol.* 12. *S. C.* See *Harvey v.*
Harvey, ante 1 vol. 561. and notes.

(2) *Simpson v. Vaughan*, ante 33.
(3) *Post.* 3 vol. 712.

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embrances, rent-charges, rents seck, fee-farms, quit
annuities, stipends to ministers, pensions and procura-
ryable thereout.

also free from all parliamentary taxes or impositions
nature and kind as were in being at the time of exe-
cution of the said power: and particularly from the land-tax then
3."

decree that it be referred to a Master to inquire and
whether the lands and tenements comprised in the
deed at the time of the execution of the said articles, of
the value of 3000*l.* according to the rule herein before
and laid down, and if not, what was the deficiency
and to be made good out of the trust-estate according to
power.

to the defendants the trustees, with the approbation of
the court, set out and convey lands and tenements of an annual
rent equal to such deficiency, according to the fruits of the
land to the plaintiff for her life, in full of the residue of her

Valliant versus Dodemede, May 2, 1742.

Cause 322.
S. C. ante 524.
post. 592.
As at law an
assignee of a
term may assign,
and thereby get
rid of his sub-
sequent rent,
and the cove-
nants which run
with the land, *a*
fortiori he may
do it in equity.

The plaintiff claims under a term for years which originally
belonged to one *Herbert* (1), and after having been grant-
ed to several persons at last vested in one *Charles Grake*, his
legatee, and one *Sedgewick* his executor. In *May*
1728 *Grake* created a new term out of the old by grant-
ing under-lease to *Richard James* for 36 years, rendering the
rent of 10*l. per ann.* The executor of *Charles Grake* did not
execute his lease, and therefore only the equitable interest in
the term passed by it. In 1728, *Richard James* made a mort-
gage of these houses to *Valliant*; afterwards, on the 31st of *May*
the same year, *Susan* or her representatives by indenture as-
signed to *Valliant* a term of 39 years and a half, together with

See also ante
4. 1141 of 2.
534. 1146.

Herbert demised the premises in
to one *Charles Great* for 39 years
after *Herbert* died, leaving *Herbert*
his executor, who demised the said
premises to *Charles Great* for a further
30 years. *Great* died, leaving
as his sole devisee and execu-
tor *Sedgewick* her
and one *Walkwood* her residuary
legatee. *Walkwood* demised the pre-
mises to *James* for 36 years, at 70*l.*
per ann. *Sedgewick* by an indorsement
confirmed this lease. *James* mortgaged
to one *Barnes*; and *Walkwood*
demised his reversionary term to one
Barnes and *James* joined in a
confirmation of *Walkwood's* lease to the
same parties and afterwards *Walkwood* and
Barnes joined in conveying the absolute

reversion of the said terms of 39 and a
half and 20 years to the *Valliants*. *James*
had built four new messuages on the
premises, in consideration whereof, and
of part of the mortgage money due on
James's mortgage being paid to the *Val-
liants*, they conveyed the four houses to
Rous in trust to secure 20*l. per ann.* for
James. The *Valliants* covenanted with
James to pay the said 20*l.* *James* and
the *Valliants* joined in an assignment of
Walkwood's lease to *Dodemede* redeem-
able by *James*: and afterwards *James*
absconded, and *Dodemede* entered into
possession, received the rents from the
under-tenants, and paid the 70*l. per*
ann. Then follow the circumstances of
the sale, and the assignment to *Lafcelles*,
as stated in the report.

another

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another reversionary term of 20 years in these premises, so that *Valliant* became not only mortgagee under *Richard James*, but was intitled likewise to the rent of 70*l. per ann.* which before belonged to *Susan*; *Sedgewick* was no party to this deed: soon after the execution of the last deed, *Richard James* built some new houses upon the premises, in consideration of which *Valliant* agreed to pay him a rent of 20*l. per ann.* and in order to secure the payment of this rent in 1730, *Valliant* demised the premises to *Rouse* in trust to pay 20*l. per ann.* to *Richard James*, and as to the residue for the benefit of *Valliant*.

The consequence of these things was, that, as matters then stood, *Valliant* would have had a remedy against *Richard James* for the 70*l. per ann.* and *Richard James* would have been intitled to a deduction of the 20*l. per ann.*

In July 1731, *Richard James* makes an assignment to *Dodemedede* of his equity of redemption in the 36 years term, and also of the rent of 20*l. per ann.* by way of mortgage for securing 300*l.* lent by *Dodemedede*: in the mortgage deed was an exception of the rent of 20*l. per ann.* and likewise of four houses which *James* had lately built.

On the 17th of July, 1733, other sums were advanced by *Dodemedede* to *Richard James*, amounting in the whole to 1300*l.* or 1400*l.*

In a short time after *Dodemedede* enters into possession as mortgagee, and, whilst he was so possessed, paid the rent of 70*l. per ann.* to *Valliant*.

In 1737, a fire broke out which consumed five of the houses, but *Dodemedede* had insured some of them.

About this time *Dodemedede* made a proposal to *Valliant* to surrender the premises to him, and in order to induce him to it, offered that he should have the insurance money, amounting to 250*l.* and that he would sell him the rent of 20*l. per ann.* for 300*l.* and that, if he would not agree to do it, he would assign the premises to any body.

Valliant rejected this proposal without making any on his side, and applying to the fire-office for the 250*l.* insurance, upon *Dodemedede*'s refusing to rebuild the houses which were burnt, and *Valliant*'s agreeing to do it, the fire-office paid *Valliant* the money accordingly.

Dodemedede took a good deal of pains to find out a person who would accept of the assignment, and at last prevailed upon *Lascelles*, a prisoner in the *Fleet*, for the price of four guineas, to accept of it, and *Dodemedede* made an assignment of it accordingly (1): from that time *Dodemedede* never received any part of the profits of these houses.

The bill is brought by *Valliant* and others against *Dodemedede* and others, praying (2) amongst other things that the assignment

(1) Dated 22d December, 1738.

(2) That *Dodemedede* may set off the said 20*l.* a year out of the said 70*l.* a year not only for the time past, but for the residue of said term of 30 years; and that the defendants may pay the plaintiffs all

arrears of the said 70*l.* a year, and pay the same for the future, as it shall become due; and that the said *Lascelles* may be enjoined from receiving the rents and committing waste.

made

made by *Dodemedé* to *Lascelles* might be set aside as fraudulent, and in consequence of it that *Dodemedé* should be obliged to pay the rent of 70*l.* per ann. to *Valliant*.

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As to the arrears of rent incurred before the fire, it is extremely plain, that *Dodemedé* is liable to make satisfaction to the plaintiff, because during that time he was in possession of the rents and profits of the estate; however as he has made an assignment to *Lascelles*, *Valliant* has no remedy for these arrears at law, and is under a necessity of coming into this court for its assistance.

The next question is, whether *Valliant* is intitled to the aid of this court to recover the arrears which incurred after the fire, and before the assignment to *Lascelles*; and though it is more doubtful than the other question, yet I am of opinion he is intitled; for notwithstanding the accident of the fire, *Dodemedé* continued in possession of the houses which were unburnt, and received the rents of the under-tenants, and was certainly liable therefore at law; and as *Valliant* cannot distrain on account of the assignment to *Lascelles*, he ought to have the assistance of this court.

But there is a great difference in regard to the arrears incurred since the assignment to *Lascelles*; and it would be going so far if the court was to assist the plaintiff against *Dodemedé* in this respect, for the law says an assignee of a term may assign, and thereby get rid of his subsequent rent, and the covenants which run with the land (1); and if it be so at law, it is reasonable that it should in equity, which in cases of this kind follow the law; though indeed it is true, that in some sort of assignments made by tenants the court has interposed. *Vide Treacle versus Coke*, *Vern* 165, and *Philpot versus Hoare*, Nov. 26, 1741. *Vide ante*, 219.

But these cases are distinguishable from the present, and particularly the last, for the great point there was, that the party to whom the assignment was made, or pretended to have been made, acted really as an agent only for the assignor; there was no disposal, as in the present case, to surrender up the premises to the landlord, and if there had, the court declared they should not be relieved.

Whereas here there was an express offer by *Dodemedé* to surrender the premises to *Valliant* on certain terms, which by no means appear to be unreasonable.

Besides too here was a general calamity, and an unforeseen one from fire; and as *Dodemedé* lent to *James* 1300*l.* or 1400*l.* upon the estate, which he is likely to lose, it would be extremely hard to oblige *Dodemedé* to pay the 70*l.* rent, since the assignment to *Lascelles*, especially as *Valliant* has received the

(1) *Pitcher v. Toucy*, 1 Salk. 81. *Lebraux v. Nash*, 2 Stra. 1221. Salk. 81. 17th. 177. But. Nisi Pri. 159. So tho' the assignment be to a beggar, &c. as in *Knight v. Freeman*, 1 Vent. 329. *Vide Walker's case*, 3 Co. 22. a. 23. a. *Valliant v. Dodemedé*.

VALLIANT v. DODEMEDE. 250*l.* from the fire-office, notwithstanding *Dodemedé* made the assurance.

The last question relates to the 20*l. per ann.* which was agreed to be paid by *Valliant* to *Richard James*, whether it ought not to be deducted out of the 70*l. per ann.*

I am of opinion that it ought, whoever is intitled to it, the representative of *Richard James*, or the defendant *Dodemedé*; for it is the ordinary direction of this court, that such sort of demands should be set one against the other (1).

(1) His Lordship directed the Master to take an account of the said rent of 70*l.* which became due from *Christmas* 1736 to *Christmas* 1738; in which account the Master was to make a particular allowance for the said 20*l.* agreed to be paid to *James*, under whom *Dodemedé* claimed; and also an allowance for the premium of insurance; and the ballance on such account to be paid to the plaintiffs by *Dodemedé*. And his Lordship ordered,

that the plaintiffs should retain the said 20*l. per ann.* as part satisfaction of the growing payments of the said 70*l.* a year since the assignment to *Lafcelles*. And his Lordship with the consent of *Lafcelles*, ordered, that he should assign the premises to the plaintiffs: and in the mean time should be restrained from receiving the rents, and committing waste. *Reg. Lib. D.* 1742. fol. 328.

Case 323. *Elizabeth Hawkyins, Widow of Philip Hawkyins, versus Obyn, Executor of Philip, May 7, 1743.*

A husband may dispose of a possibility in equity, if assigned for a valuable consideration; but it must be an assignment of that particular thing, and not rest only on intention and construction of words in a covenant.

THIS cause came on before the Chancellor upon appeal from the Rolls.

Under v. Jackson
Russell. 1.
Cum v. Martin
Russell. 65.

The question arose out of the following covenant entered into by *Philip* upon his marriage with the plaintiff.

He covenants for himself with trustees, "that as well the 6000*l.* portion with *Elizabeth* his wife, as all other sums of money which should be given or bequeathed to *Elizabeth* by "any of her relations during her coverture, should immediately after the decease of *Philip* be paid by his heirs, executors, &c. to trustees, in trust to place out the same at "interest on land or government securities, and the interest thereof to be applied for and towards the maintenance of the "children of *Philip* by *Elizabeth*, and the remainder of such interest, if any, together with the whole 6000*l.* to go or be "paid equally among his children, except his eldest son, to sons "at 21, to daughters at 21, or marriage; and in case of the "death of any of them before time of payment, to the survivors." "Provido, in case there should be no issue, then the 6000*l.* "and all other sums of money that during the marriage should "be given to the said *Elizabeth*, should be enjoyed by him the "said *Philip Hawkyins*, his executors, administrators and assigns, "to his and their own proper use and behoof."

On

On the 4th of June, 1730, *Mary Ludlow*, mother of *Elizabeth*, made her will, "and bequeathed to her son and daughter *Elizabeth*, and *Philip Hawkyins*, 2000*l.* to be enjoyed by them and the survivor of them (1), and if there was no issue of her son and daughter, then she devised, after the death of the survivor of *Philip* and *Elizabeth*, the 2000*l.* to her executor, and directs the legacy to be paid one half 15 months after her decease, and the remainder in two years and a quarter, and appointed *Lambert Ludlow* sole executor."

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Lambert Ludlow paid 1000*l.* in the life-time of *Philip Hawkyins*.

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Philip Hawkyins the husband died, but left no issue; and by his will "devised the 1000*l.* which remained unpaid by *Lambert Ludlow*, to his wife, to be disposed of as she shall think proper, and bequeathed all the rest and residue of his real and personal estate to his nephew *Thomas Hawkyins* when he attained 21, and then made him his executor, and, in the meantime, devised all his real and personal estate to *Obyn*, in trust for *Thomas Hawkyins*."

It was heard before the present *Master of the Rolls* on the 10th of December, 1742, who decreed the plaintiff was intitled to the interest of the 2000*l.* devised by Mrs. *Ludlow's* will for her life (2).

The defendant *Obyn* insisted the decree was wrong, in decreeing the interest of the 2000*l.* to the plaintiff for her life, whereas he is well intitled as executor of *Philip*, under the agreement and proviso in the marriage settlement, to all such sums as should be given to the plaintiff by any of her relations during the coverture, and therefore is not obliged to pay interest to the plaintiff for the 1000*l.* received by *Philip* in his life-time, but insisted it belongs to him as representative of *Philip*.

Mr. *Brown* cited for the plaintiff the case of *Thamson* versus *Butler*, *Moore* 522.

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I am of opinion this is not a sum of money at all within the meaning of the proviso; for it is a covenant merely by the husband, and consequently an agreement of what is to be done by him; his heirs, &c.

It has been objected, that tho' it sets out with a covenant of the husband, yet the proviso is attended with other words, and that it is itself a covenant.

But then it must be connected with and controlled by that covenant, and must relate only to such sums of money as fall under the description of the first covenant, which is relative to nothing, but such sums of money as came to *Elizabeth* during the coverture, to which Mr. *Hawkyins* might be intitled, and the covenant therefore thrown in on purpose to restrain Mr. *Hawkyins* from disposing of it to the prejudice of his younger

(1) During their joint lives, and the life of the longest liver of them, and among such of their children, as should be living at the decease of such survivor.

(2) *Reg. Lib. A.* 1742. fol. 100.

children;

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children ; for even the sum of 6000*l.* would absolutely have been the husband's, if it had not been for this covenant.

It was said on the defendant's part likewise, that (as the covenant runs that from and immediately after the decease of *Philip Hawkyns*, his heirs, executors, &c. should pay to trustees as well the 6000*l.* as all other sums of money which should be given to *Elizabeth*, &c. the executors must necessarily receive, or how will they be enabled to pay ?

But it would be an absurd thing for him to covenant that his heirs should pay sums they could never be intitled to receive ; nor can I restrain these words, to prevent any future disposition that the husband might be inclined to make for the benefit of the wife ?

It has been insisted too, in order to make this fall within the proviso, that the husband's disposition in his life-time would have bound the wife, notwithstanding she had survived him, and if not good in law, yet it would have been in equity.

I will not say, but the husband might have disposed of this possibility in equity, if assigned for a valuable consideration, (1) ; but then that must have been upon an actual assignment of this particular thing, and here it rests only upon the intention of the parties, and the construction of the words in the covenant.

Upon the whole, I am of opinion, this is not such a sum of money as was intended under the covenant ; and it would be very hard to make a strained construction of the deed to take away this 1000*l.* from the wife ; therefore the decree must be affirmed (2).

(1) *Vide Bates v. Dandy*, ante 208.

(2) *Reg. Lib. A. 1742. fol. 438.*

Case 324. *The Bailiffs and Burgeses of the Corporation of Burford versus Lenthall and others*, May 9, 1743.

Exceptants to a decree of charitable uses were allowed costs on thot exception, where they prevailed, and on these where they

EXCEPTIONS had been taken to the decree of the defendants, as commissioners of charitable uses, and 39 exceptions out of 43 were allowed ; but there being some doubt as to costs, the Chancellor took time to consider it till to-day.

did not, the respondents are intitled to costs (1).

There have been six precedents brought to me ; in which costs were given, and as I find the point thus settled, I will follow the justice of these cases, whatever doubts I might have had originally myself, especially as there are no precedents on the other side to the country.

The first precedent is *Chapman versus The Inhabitants of Tedbury*, before Lord Keeper *Coventry*, 5 *Car. 1.*

(1) *Aylet v. Dod*, ante 238.

The

The second was in Lord Chancellor *Nottingham's* time, February 29, and the 28th year of *Car. 2.* relating to the rectory and parsonage of *Crowland* in the county of *Lincoln*.

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The third was before Lord *Somers*, which began in the year 1693, and lasted some time, relating to the college of *Bromley*, charity founded by *Ward*, bishop of *Rockester*.

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The fourth was before the Lords Commissioners, *H. T.* 1700.

The fifth was before Lord Keeper *Wright*, *Cristchurch* versus *the inhabitants of Newton*, the 4th of *Q. Ann.*

The sixth was *Hancock* versus *Walker*, before Lord *Cowper*, January 3, 1715.

It is said by the respondent's counsel, that these precedents are erroneous, because there is no authority whatever given to the Lord Chancellor to award costs by the statute of charitable uses, c. 43d of *Eliz.*

If the court were merely to confine themselves to the verdict of a jury, or a decree of commissioners, they must have shut their eyes as to the evidence before the jury or commissioners, cause there it was *viva voce*, and from hence have arisen these precedents; for the court finding these words in the act of parliament, *sect. 9. That the Lord Chancellor, or Lord Keeper, shall take such order for the due execution of all or any of the said legments, decrees, and orders, as to them shall seem fit and convenient*, have put it in the shape of an original cause, in which the ceptants are considered as *plaintiffs*, and the respondents as *defendants*, and put in an answer upon oath; and in the examination of witnesses in the cause, neither side is bound by what appeared before the commissioners, but may set forth new matter if they think proper.

Notwithstanding a decree under a commission of charitable uses, the court of chancery may still permit a suit to be instituted here, in which neither side is bound by what appeared before the commissioners, but may set forth new matter.

This has made the court all along consider it as an original case, or, otherwise, the court would have known nothing of its merits.

Therefore the court have mixed the jurisdiction of bringing information in the name of the Attorney General, with the jurisdiction, given them under the statute, and proceed either way, according to their discretion.

It is said the court ought to resort back to the original jurisdiction, in point of costs, upon arguments chiefly drawn from acts of costs at common law, and the old acts, the stat. of *arlebridge*, 52 *Hen. 3.* (now *Marlborough*), &c.

But courts of equity have in all cases done it, not from any authority, but from conscience, and *arbitrio boni viri*, as to the satisfaction on one side or other, on account of vexation.

But still it is said this ariseth on the common law side, as it does out of the petty-bag.

It is conscience, and not any authority, directs this court in giving costs (1).

The return of the commission indeed being in that office, the petty-bag retains the proceedings, yet it comes before the Lord Chancellor personally, and not in his ordinary or extraordinary jurisdiction.

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(1) *Jones v. Coxeter*, ante 400.

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I should be glad to know what authority I have to give costs in bankruptcy, if I cannot give costs here; for it would be difficult to shew from the bankrupt acts, that I have any such authority.

It is only by orders signed *propria manu*, and processes of contempt.

The same as to commissions of lunacy, for though it is said the whole of it arises from the sign manual of the king, yet I am of opinion it does not.

After the court of wards was taken away, the jurisdiction over lunatics and ideots reverted back to the court of chancery, to whom it originally belonged.

Before the courts of wardship were erected, the jurisdiction was in this court, both as to lunatics and ideots, therefore all these commissions were taken out in this court, and returned here, and after the court of wards was taken away by act of parliament, it reverted back to the court of chancery; and the sign manual of the king is a standing warrant to the Lord Chancellor, to grant the custody of the lunatics, and is a beneficial thing in case of ideocy, because the king could not only give the custody of ideots, but the rents and profits of ideots' lands to persons (1).

Lord Chancellor's authority in the cases of charitable uses, is a personal one, not from his ordinary or extraordinary jurisdiction.

Therefore it is not an authority in the Lord Chancellor arising from his ordinary or extraordinary jurisdiction, but a personal one, and very difficult to maintain, upon a nice foundation, how this authority of costs did arise, but falls exactly within the cases of bankrupts and ideots: *Vide the case of the corporation of Bewdley*, 1 P. Wms. 207. relating to awarding *venue de vicinato & de corpore comitatus*, where the court was governed by precedents of about seven years standing, before the issue of the *venue*.

So likewise in the case of justices of peace, they have taken upon them to exercise several jurisdictions, which the court of king's bench would not have allowed, if it had come originally before them.

I am of opinion therefore, I ought to be bound by these precedents, especially as it is in aid of justice.

The question then is, What ought to be done as to costs above, and costs below.

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And as to the first, the exceptants ought to have costs upon these exceptions, in which they have prevailed, and the respondents costs in those where they have prevailed (2).

As to costs below, it must rest upon the agreement made between the parties, and I will not interfere.

(1) *Vide* in the matter of *Hilli* a lunatic, 14th. 3 vol. 633.

(2) *Reg. Lib. A.* 1742. fol. 765. 715

Sadlers Company versus Badcock and Others, May 9, 1743. Case 225:

J N Strode, having six years and a half to come in the lease of a house from the plaintiffs, on the 27th of *April* 1734 ne a proprietor of the Hand-in-hand office, by insuring the of 400 *l.* on the house, for seven years, and on paying e shillings down, and three pounds some time after, the any agreed "to raise and pay out of the effects of the con- sution stock; the said sum of 400 *l.* to her and her execu- s, administrators, and assigns, so often as the house shall burnt down within the said term, unless the directors shall ld the said house, and put it in as good plight as before: fire: and on the back of the policy it was indorsed, that if s policy should be assigned, the assignment must be entered hin twenty-one days after the making thereof."

s. *Strode's* lease expired at *Midsummer* 1740, the house not burnt down till the *January* after 1740, and she made lignment of the policy to the plaintiffs the 23d of *February* 1740.

ie question is, Whether the plaintiffs, the assignees of Mrs. s, are intitled to the 400 *l.* insurance money, or to have the built again; or whether the house being burnt down after *Strode's* property ceased in it, the company are obliged to good the loss, to her assignee, of the policy.

ie company made an order, subsequent in time to Mrs. 's policy in 1738. "That whereas policies expire upon property of the insured's ceasing, if there is no application the insured to assign, or to have the loss made up, then the son having the property may insure the said house in the l office, notwithstanding the term for which the house was ginally insured is expired."

ere was evidence read for the plaintiffs, to shew that they red the assignment to the defendants, to enter in their s, but they refused to accept of it.

RD CHANCELLOR,

iring the progress of this cause, while the defendants seem- depend chiefly upon the subsequent order, I was of opinion ft them.

t, upon hearing what was further offered, I think the plain- re not intitled to be relieved.

ere may be three questions made in this cause:

st, Whether this accident which has happened is such a as obliges the defendants to make satisfaction to the plain-

ndly Whether, upon the terms of the original policy, the is obliged to do it?

irdly, Which is rather consequential of the former, whether plaintiffs are properly assignees of Mrs. *Strode* under this t?

It is necessary the party injured should have an interest or prop- erty in the house insured, at the time the po- licy is made out, and at the time the fire happens; and therefore, after the lease or the house ex- pired, the in- sured's assigning the policy does not oblige the in- surers to make good the loss to the assignee:

Southland v. Pao
11 Mass. 429.

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If this matter rested singly upon the policy itself, I should not think it such a loss, as would oblige the defendants to make satisfaction.

Under this policy, the state of the case is, Mrs. *Strode* was only a lessee, her time expired at *Midsummer* 1740, the house was burnt down the *January* after, *within the seven years*; the plaintiffs, the Sadlers company, were ground landlords, and intitled to the reversion of the term: Upon the 23d of *February* 1740, seven months after the expiration of the term, and one month after the fire, the assignment was made, and in consideration of five shillings only, so that it must be taken as a voluntary assignment as it stands before me.

It has been insisted, on the part of the defendants, that the plaintiffs are not intitled to recover as standing in the place of Mrs. *Strode*, because she had no loss or damage, her interest ceasing before the fire happened.

And this introduces the second and third questions.

I am of opinion, it is necessary the party insured, should have an interest or property at the time of the insuring, and at the time the fire happens.

[556] It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay, if lost.

Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there interest or no interest is almost constantly inserted, and if not inserted, you cannot recover unless you prove a property.

The insuring of ships is as old as the laws of *Oleron* and *Rhodes* whose inhabitants were the great traders of the world; look into the books that treat of insuring, and you will find the term is, *averfio periculi*, the intention of all insurances being to avert any damages or loss the insured might sustain: Upon this principle, in all modern insurances of ships *interest or no interest* is introduced, and, between the subjects of different nations, for this reason, because a great deal of contraband trade is carried on, and I believe began in the *Spanish* trade first (1).

The common law leant strongly against these policies for some time, but being found beneficial to merchants, they winked at it.

New laws have been enacted, which make it felony to destroy ships, and the temptation to it has arisen from *interest and no interest* inserted in policies.

No longer ago, than when I first sat in the Court of King's Bench, I have heard these insurances called fraudulent, but though inconveniences may have arisen from these words to the

The term in books that treat of insuring is *averfio periculi*, the intention being to avert any damages or loss the insured might sustain.

(1) But such insurances are rendered void by *stat. 19 Geo. 2. c. 37.*

insurance companies, yet some inconvenience too may arise on the other side, because, if any person may insure, whether he has property or not, it may be a temptation to burn houses, to receive the benefit of the policy: By the first clause in the deed of contribution in 1696, the year this society, called the *Hand-in-hand office*, incorporated themselves, the society are to make satisfaction in case of any loss by fire.

To whom, or for what loss, are they to make satisfaction?

Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage.

By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens.

It has been truly said, this gives the society an option to pay or rebuild, and shews most manifestly they meant to insure upon the property of the insured, because nobody else can give them leave to lay even a brick, for another person might fancy a house of a different kind.

[557]

Thus it stands upon the original agreement; The next question will be, Whether the subsequent order, made by the defendants in 1738, has made any alteration?

I am of opinion it has not; for it was made only to explain a particular case in the policy; for it might have been a question, whether Mrs. *Strode* could have come before the expiration of the term, to have examined the books of the office, and therefore this order was made to give her such a power.

It has been strongly objected, that the society could not make such an order.

I am very tender of saying, whether they can or not.

Because on one hand, it might be hard to say, that, as a society, they cannot make any by order for the good of the society.

And, on the other hand, it would be a dangerous thing to give them a power to make an alteration that may materially vary the interest of the insured.

The assignment is not at all within the terms of this order, because it is plain, it meant an assignment before the loss happened.

Now, with regard to the loss happening before the assignment made, Mrs. *Strode* was intitled to nothing but what was to be paid back upon the deposit.

It is plain she thought so, for if she had imagined she had been intitled to 400 l. would any friend have advised her to make a present of it to the plaintiffs?

The case of *Lynch* versus *Dayrell*, in the House of Lords, the 13th of March 1729 (1), shews how strict this court and the House of Lords are in the construction of policies to avoid frauds:

Policies of assurance not assignable in their nature, nor intended to be

assigned from one to another person without the consent of the office.

(1) 3 Bro. Par. Ca. 497. S. C.

L 1 3

Lord

The Sailors'
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Lord Chancellor *King* was of opinion there, the plaintiff had no right to the money under the policy, because no loss had happened to him, he having no interest in the thing insured at the time of the fire, and that policies are not in the nature of them assignable, nor intended to be assigned from one person to another, without the consent of the office.

The bill here must be dismissed.

Case 326.

Tyrrell versus Hope, May 10, 1743, at the Rolls.

[558]

The Master of the Roll of opinion, that a note under the hand of the husband ought to be looked upon as part of the marriage agreement, and consequently as part of the settlement; and as the wife would have been relieved if she had brought a bill against the husband, equally so, as brought against the assignee, who stand in his place.

THE plaintiff before her marriage with *John Tyrrell* was seised in fee, or her mother *Mrs. Stanton* was, of an estate in *Berkshire*, and in consideration of the intended marriage, and of 1500 *l.* paid to *Mr. Tyrrell* as her marriage portion, it was agreed that the estate should be settled previous to the marriage, so as that one moiety might be enjoyed by the plaintiff's mother for her life, and after her decease by the plaintiff, or her trustees, for her sole and separate use, exclusive of her husband, and that she should receive the rents and profits during her husband's life, and that as well the said moiety after the plaintiff's decease, as the other moiety (1), should be settled upon such trusts as the plaintiff by any deed in her life-time or by will should appoint.

Mr. Tyrrell the intended husband undertook to procure deeds to be drawn pursuant to the agreement.

But when the deeds were reading over to the plaintiff in order for execution, she observed there was a mistake, for that the moiety of the premises limited to her mother for life, was after her decease limited to the use of *Mr. Tyrrell* for life, and not to her separate use, as had been agreed; and she refused to execute unless the mistake was rectified: in order to do this it was then proposed by the trustees, that *Mr. Tyrrell* should give a note or writing under his hand, that the plaintiff should take and receive one moiety of the estate after her mother's death for her sole and separate use, according to the agreement, as if the same had been so settled by the release; and thereupon *Mr. Tyrrell*, previous to the execution of the deeds, gave the plaintiff a note or writing to the purpose aforesaid, and delivered it to the trustee named in the release, to keep for the plaintiff's benefit.

The marriage was had shortly after, and upon the 8th of *July*, 1739, *Mrs. Stanton* the mother died, and on the 14th of *July*, 1740, a commission of bankruptcy issued against *Mr. Tyrrell*, and he being found a bankrupt, *Mr. Hope* and others were chosen assignees, and being got into the receipt of all the rents of this moiety, refused to let the plaintiff receive them, or to make any settlement for securing the receipt thereof to her, pursuant to the agreement before her marriage.

(1) But this moiety, it seems, was agreed to be settled in strict settlement.

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The bill was therefore brought against *Hope*, and the other assignees, for an account of what they have received of the rents, and that a moiety of them for the future may be assured to the plaintiff for her sole and separate use.

Mr. Tyrrell by the note *promised and agreed with the plaintiff by the name of his intended wife Mary Stanton, that she should enjoy and receive the issue and profits of one moiety of the estate, then in possession of her mother Mrs. Jane Stanton, after the decease of her mother.*

[559]

Mr. Noel for the defendants insisted that both note and deed must stand together, and if they cannot, the deed ought to controul the whole, because a deed is of more authority in the notion of law than a note signed by one person only; and for this purpose he cited *Bawdes versus Amburst, Eq. Caf. Abr. 21.*

That while courts have deeds only before them they have a sure foundation, but if they go out of the deeds, witnesses may be guilty of perjury, and therefore the court has always leant strongly against parol evidence, because this may err, that cannot.

That as no body was present when the note was given, but persons in the interest of the plaintiff, it would be of dangerous consequence to lay much stress upon such evidence, especially, as it is not possible to produce any on the other side. *Vide Clarkson versus Hanarway, 2 P. Wms. 203.*

That supposing the word *separate* had been inserted in the note, that it would not have given the wife, as it is a note to her, a *separate interest* during the coverture. *Hob. 113. Clark versus Thompson, Cro. Jac. 571.*

Mr. Brown for the plaintiff relied upon the case of *Walker versus Walker, December 11, 1740 (1)*, as an authority in point (with regard to the evidence that is offered on the part of the plaintiff), and which ought to be allowed upon this footing, that it was a fraud in the husband to draw in the wife to rest upon his promise without altering the deed; and upon this suggestion parol evidence may be admitted, notwithstanding the statute of frauds and perjuries.

Master of the Rolls. The case now depending arises upon the deed executed before marriage, and upon the note signed before the deed.

The first question is, what relief the plaintiff would have had, if it had been a bill brought against the husband.

The second question, if she is intitled under this bill to the same relief against the assignees of the husband.

I shall consider it in the same light as the counsel have done.

[560]

Now as to what has been said with regard to the mischiefs produced by *separate maintenances*, I shall lay that out of the case, for we must not be directed by what we think of it in our own private judgments, but upon what the court has judicially done in separate maintenances.

In separate maintenances the court must be directed by judicial determinations, and not by what they

think of them in their private judgment.

(1) *Ante* 98. S. C.

L 1_4

Then

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Then as to the first point.

Upon the deed to be sure the wife can have no relief, for there are no words in it that can convey a *separate estate* to the wife.

But then it is insisted the note has supplied this defect; and that a witness has explained the matter fully.

Parol evidence cannot be admitted to explain the agreement between the parties, but as to the occasion of signing the note it may.

An objection was made to admitting this evidence: and a case cited in *Eq. Cas. Abr.* 21. *Barvdes* and *Amburst*, where evidence was offered to shew the uses of a marriage settlement, but was not admitted there, because it was not signed by the party.

Here the note insisted on is signed by the party the husband himself.

The next question, how far I shall give weight to this evidence: it says, that a moiety of the estate was to be settled to the *separate* use of the wife after the death of the mother; now if the matter rested singly upon the note, no parol evidence ought to be admitted to explain the agreement between the parties (1).

But I am certainly warranted in admitting this evidence, so far as it goes to the reason and occasion of signing this note.

The next consideration what effect it shall have.

I readily agree, where there is any writing executed after the settlement, and differs from it, the settlement shall controul it.

A settlement will controul a writing executed after, but the parties refusing to execute the settlement without it, they must be construed as one intire agreement, and both consistent.

But if I take the evidence into the case with regard to the reason of giving this note, it will have a different consideration with me, because the wife refused to execute the settlement without it: and if so, I must construe it as one entire agreement before marriage, and both of them consistent.

For it is plain here was a new agreement between the parties, and that it was upon the credit, faith and footing of the note, the settlement was executed by the mother and the wife.

Fraud is what is done in secret, and where there is a concealment from the party in a matter which concerns him in interest.

*As to the fraud which the plaintiff's counsel have suggested in the case, it is not so clear; because the settlement was read to the mother and the wife before execution, so that they did it with their eyes open; now fraud is what is done in secret, and where there is a concealment from the party in a matter which concerns his interest.

[*561]

I cannot say indeed the note is good in law against the marriage settlement, but in equity it ought to be looked upon as part of the marriage agreement, and consequently as part of the settlement, and therefore, if the wife had brought a bill against the husband, she would have been intitled to relief.

Several cases have been cited to shew that this note is void in law, and equity: but upon the circumstances of this case I do not think it is.

(1) *Vide Walker v. Walker*, ante 58. *v. Poulet*, ante 383.
Ulrick v. Litchfield, ante 372. *Particrche*

There is a strong case to this purpose, where a bond is given by a husband to a wife before marriage to secure a sum of money to her use, which is void in law, and yet in equity will be considered as a trust for the wife (1).

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One thing more before I leave the consideration of the note is, what will be the effect of it.

It has been said by the plaintiff's counsel that though it is not expressed, yet it is implied in the note, that she shall have this moiety to her *separate* use.

Though the words *separate use* are not in the note, the words *enjoy the profits* imply it.

Now the words *separate use* indeed are not in the note, but here are other words which amount to it (2).

That she shall enjoy and receive the issues and profits of one moiety of the estate, &c.

Which can admit of no other construction but that it must be for her *separate* use; for to what end should she receive it, if it is the property of the husband the next moment?

The word *enjoy* too is very strong to imply a *separate* use to the wife.

The second question is, if the wife is intitled to the same relief against the assignees of the husband, as she would against the husband himself.

It has been insisted by the defendant's counsel that assignees are trustees for creditors, and creditors are always favoured in law, so that when they have the legal interest, they shall have the equitable estate against a person who has only an equitable interest.

It must be owned the legal estate vests in the husband, and by assignment in his assignees, and the general rule is, that they stand in the place of a bankrupt; but I think it does not hold in every case.

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For instance; Where there is a voluntary conveyance by a bankrupt, the court may carry it into execution against the bankrupt himself, but not against his assignees.

The court will not carry a voluntary conveyance of a bankrupt into execution before the bank-

ruptcy, otherwise as to a conveyance for a valuable consideration, before the bank-

The reverse, where it is a conveyance by the bankrupt for a valuable consideration before an act of bankruptcy committed; it is most certainly is here, for then the wife takes in consideration of marriage, and of an estate moving from her.

The case of *Taylor versus Wheeler*, 2 Vern. 564. comes very near the present; for there the legal interest was vested in the assignees.

There is another reason why I think the assignees can be considered no otherwise than as the bankrupt himself, because what

Where by acts before marriage the husband made himself in so too of course.

the nature of a trustee for the wife, his assignees must be

- (1) *Watkins v. Watkins*, ante 96. 399. *Graham v. Londonaerry*, *ibid.* 393.
(2) *Vide Darley v. Darley*, post. 3 vol. *Lec v. Prieux*, 3 Bro. Cba. Rep. 381.

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has been done upon the *marriage* is in the nature of a trust only for the wife: and therefore if the husband is only a trustee for the wife (1), the assignees of course must be trustees in the same manner as the husband was.

Taking then all the circumstances together; as she would have been intitled to the relief she prays against the husband, she is equally intitled to relief against the assignees (2), but without costs, as it was their duty, being trustees only for the creditors at large, to bring a case so circumstanced before the court (3).

- (1) *Ex parte v. Davis*, 2 P. W. 316. *Jackson v. Moulson*, ante 417.
Darley v. Davley, post. 3 vol. 399. *Kelce* (3) See *Ex parte Byas*, ante 1 vol.
v. Budder, *Bunb.* 187. 124. *Witch v. Kesley*, 1 *Dunn. & Eggt*:
 (2) *Reg. Lib. B.* 1742. fol. 375. *Rep.* 619.

Case 327.

Cook versus Duckenfield, May 14, 1743.

S. C. post. 567.
 Where trustees have a power of selling real estate and turning it into money, or keeping it in land at their option, it will be subject to the same trust as the personal estate is applied to, whether sold or kept as real estate.

THE question in this cause arose on the will of Mr. *Thomas Cotton* of *York*: who in the first place says, "I give my whole real estate to my son and the heirs of his body, and in case of his dying a minor, or without issue, then I give all my lands, tenements, &c. in and about *Tollerton*, to the defendant and four others by name, for such charitable uses and purposes as I shall direct by codicil or otherwise.

residuary of
 charitable donations
 to
 Sullivan
 (Dun. & Dunn: 50)

"And as to his personal estate, the same trustees are to discharge a sum left to an hospital in *York*, and some pecuniary legacies out of it; and then directs them to call in and dispose of the residue of his personal estate, as they or the survivors or survivor of them shall think fit, and to apply the interest and produce, or so much as they shall judge necessary, towards the maintenance of his son till his age of twenty-one, and upon his attaining such age or marriage, to pay and deliver up the same to his hands: but if he shall happen to die before such age or marriage, the testator says, I then will that the residue of my personal estate be disposed of among widows and orphans of dissenters, and to my poor relations in such proportion as they shall think fit: and makes the trustees executors."

[563]

The Codicil.

"Whereas I have by my last will, to which this is a codicil, given and devised to my trustees therein named, and their heirs, my lands, &c. in *Tollerton*, in case of my son's dying a minor, or without issue, for such uses and purposes as I shall direct by a codicil or otherwise: now I do hereby, pursuant to that clause in my will, order and direct in that case, that the said lands and tenements shall, at the discretion of my said trustees,

“ trustees, be sold and disposed of, or kept in their hands or pos-
 “ session, and that the purchase money arising thereby, or the
 “ rents and profits thereof, shall be applied and distributed to and
 “ amongst such persons, or to and for such uses or purposes, and
 “ in such manner, as I shall by any writing direct and appoint,
 “ and for want of such direction and appointment, then to such
 “ person, or such uses or purposes, and in such manner and
 “ proportions, as they the said trustees, or the major part of
 “ them, or, in case of death, the survivors or survivor of them,
 “ or the heirs of such survivor, shall judge fit and convenient :
 “ I do further, but yet only in case of my son’s dying a minor
 “ or without issue, give and devise by this codicil unto my above-
 “ said trustees my dwelling-house in *York* with the appurte-
 “ tenances, for to sell or keep the same in their hands, and
 “ apply and dispose of the purchase-money, or of the rents and
 “ profits arising from the last mentioned premises, to and for
 “ the same uses, intents and purposes, as all the other lands and
 “ tenements above named, that is to say, such as I shall by
 “ any writing or memorandum direct ; or for want thereof, as
 “ they the said trustees shall judge fit and convenient.”

The testator’s son is dead under age and without issue.

The testator has left no directions by writing or memorandum as to the application of the lands at *Tollerton*, or his dwelling-house at *York*.

The trustees insist upon the beneficial interest in both : and the heir at law of the testator claims them as a resulting trust.

For the trustees were cited, *Floyd* versus *Spillet* (1), before Lord Talbot.

And for the heir at law, *Hobart* versus *The Countess of Suffolk*, 2 Vern. 644.

LORD CHANCELLOR,

[564]

The bill must be amended ; and the Attorney General, in behalf of the charity to widows and orphans of dissenters, and to testator’s *poor relations*, must be made a party.

But, however, I will break the case at present, which is attended with some difficulty.

The general question is, Whether there is a resulting trust for the heir at law ?

Secondly, Whether defendants are to be considered as trustees throughout ?

Thirdly, Whether they take any beneficial interest for themselves ?

Fourthly, If not, Whether they are trustees for the heir at law, or for any other person ?

It appears to me a very strong case, from the intention of the testator, that they should be trustees throughout, both as to the real and personal estate.

I have looked into the trustees’ answer, and they are not so sanguine as to insist upon a beneficial interest, but only say the

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heir at law has none, and that upon the contingency of the son's dying a minor, and without issue, the interest devolved upon themselves.

It will be extremely difficult to give the trustees a beneficial interest.

The devise to his son is an immediate devise, and what follows to the trustees is by way of remainder in case the son die without issue.

It is admitted that if the testator had given no directions by his codicil, they would have been trustees for the heir at law under the will. *See before the devises of the personal estate, and of the residue of the personal.*

The general question is, Whether the will and codicil must be taken together?

Nothing can be plainer, than that the testator has treated them as trustees throughout, both as to the real and personal estate, and has only given them a power of appointment.

[565]

It has been insisted for the trustees, that, as it is a general power of disposing, it amounts to a devise of the beneficial interest to them.

It will be straining the power very much, to construe it as giving them a beneficial interest.

Whoever takes
under a power,
takes from the
grantor, and not
from the power
itself.

Wherever a power is given, whoever takes the estate, takes from the grantor by whom that power is created, and not from the power itself (1)

They are to appoint to such uses as they, or the major part of them, &c. shall judge fit and convenient.

If, as has been said, they may appoint to themselves, will not the major part be ready to say, we will exclude you, or you, because we will make our shares larger?

Suppose they were to dispose of it in proportion, may not three out of the five say, we will exclude the other two?

In all cases of powers, where it is not executed, it results to an heir at law; if executed, it is out of the heir at law.

It has been insisted for the trustees, that the beneficial interest may be given them by way of power, as well as by express words.

But then this is a power executable eternally, and as long as the world endures, because it is given to the heir of the survivor.

Mr. Attorney General, for the trustees, put this case: Suppose five persons should agree amongst themselves, that such a sum of money or estate be disposed of by them as they should appoint; this would be a good agreement, and if they made no disposition, a resulting trust for themselves.

But this appears to me quite a different case from a power of appointment over a third person's property.

Now I think there is a great colour to say, some charity was intended.

The testator had both real and personal estate; these trustees are likewise trustees of his personal estate, and executors.

The question will be, Whether, upon the codicil, the real estate may not be connected with the directions the will has given as to the personal estate.

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Several cases have been cited, to shew that a devise of real estate to be sold, will make it personal estate.

But this is where the real estate is given to a devisee of personal, for the payment of debts and legacies; and the rule of law is, that it is assets in his hands. *Vide Mallabar versus Mallabar, Cas. in Eq. in Lord Talbot's time, 78 (1).*

Where real estate is given to a devisee of personal, for payment of debts, it is assets. A bare intention, or even negative words, will not exclude an heir at law from insisting on a resulting trust.

In the case, cited by the Solicitor General, of *Floyd versus Spillet*, there was this farther circumstance, that they were very near relations, a wife and children, and in all such cases, inferences of bounty have been drawn, and consequently rebuts any equity the heir at law might have of a resulting trust; though it is very true, a bare intention will not exclude an heir at law, may negative words will not.

But here the charity, which is in this case, is of another consideration.

The testator has given a power to the trustees to sell this land: Suppose they had sold it, and turned it into money, it absolutely becomes personal estate; and so *vice versa*, would it not then, if sold, have fallen under the same directions with the personal estate?

It is true, it is not absolutely and imperatively directed to be sold: But the question will come to this, as the testator has given the trustees a power of selling and turning it into money, or keeping it in land, at their option, if it will not be subject to the same trust as the personal estate is applied to, whether sold, or kept as real estate.

I am of opinion, it will fall under the same direction, because he has given it under a trust, and to the same trustees.

This is the stronger, by reason of the absurdity, that he should give it to trustees who cannot keep it themselves, though his particular friends, and yet may give it away to strangers, if they thought fit; and it would be very extraordinary, that their keeping it in one form, or both, should change the nature of the devise, and intention of the testator.

This makes it a considerable question for the charity, and *his poor relations*; and therefore the cause must stand over, and the Attorney General be made a party in behalf of the charity.

(1) *Vide Hill v. Bishop of London, ante 1 vol. 619. and the cases there cited.*

Case 328.

*Cook versus Duckenfield and others, February 7, 1743**This Cause was again in the Paper.*

LORD CHANCELLOR,

S. C. ante 562.

A man by empowering other

persons to dispose of his estate, disinherits his heir, as much as by his own actual disposition.

THERE can be no doubt at all but it was the intention of the testator to give it from the heir.

The *first* general question is, Whether here is any resulting trust?

Secondly, If there is not, Whether the defendants are to take the estate for *their own benefit*?

This can be no resulting trust, for, as has been truly said, a man may dispose of his estate by an actual disposition himself, or by empowering other persons to dispose of it, which equally disinherits the heir at law.

By the will, "in case of his son's dying a minor, or without issue, the testator gives all his lands, tenements, &c. to the defendant, and four others, by name, for such uses and purposes as he shall direct by codicil, or otherwise."

The codicil takes up the consideration of his son's dying a minor, or without issue; and then says, "I do hereby, pursuant to that clause in my will, order and direct in that case, the said lands and tenements shall, at the discretion of my said trustees, be sold and disposed of, or kept in their hands and possession."

If the testator had stopped here, the heir at law indeed would not have been disinherited; but it follows, "And that the purchase money arising thereby, or the rents and profits thereof, shall be applied and distributed to and amongst such persons, or to and for such uses or purposes, and in such manner, as I shall by my writing direct and appoint, and for want of such direction and appointment, then to such person or persons, or such uses and purposes, as they the said trustees, or the major part of them, or, in case of death, the survivors or survivor of them, or the heirs of such survivor, shall judge fit and convenient."

This comes within the latter part of the division of a man's power over any branch of his estate, by directing another person to dispose of it.

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It was said to be so vague and uncertain, that it is void in itself.

A devise to A. and such uses as he shall appoint, was good before the statute of

But, why should it be so? Cannot a testator do it as to a single person? To A. and such uses as he shall appoint, was good before the statute of uses and wills; for when A. shall appoint, the *cestui que use* is in by the testator, and not by the appointer.

point

joint the *cestuy que use*, he is in by the feoffor from the beginning, and not by the appointer (1).

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As the survivors, or survivor of them, &c.

It is true, if you consider this as a beneficial interest for the trustees, it might be liable to absurdities; but when you consider this as disinherit the heir, you must try whether it can be carried properly into execution, to any use or purpose, exclusive of the heir.

If a testator says, I will my heir shall sell the land, and does not mention for what purpose, it is in the breast of the heir at law, whether he will sell it or no, and he may chuse to keep it, and who can compel him to do otherwise?

Where a testator
says, I will my
heir shall sell
the land with-
out mentioning
for what pur-
pose,

he is not obliged to sell; but if he appoints his executor to sell, it is turned into personal assets, and leaves no resulting trust in the heir.

But when the testator appoints an executor to sell, his office shews that it is intended to be turned into personal assets, without leaving any resulting trust in the heir (2).

Here they are trustees throughout for charity, so that it is determined for what it shall be sold, and if there are no words expressing any particular purpose, it must be spelt out by circumstances; and I am of opinion, on the circumstances of this case, that the heir at law is plainly disinherited, and there is no resulting trust.

Ast to the second point, it is as plain that the defendants have no beneficial interest, for several parts of the will and codicil speak there being *trustees* (3), such as indemnifying them against any costs or charges they might be put to, and several other passages in the will and codicil confirm it.

Giving it to *five* persons, whom he names trustees, to such purposes as they, or the major part of them, shall judge fit, shews plainly he intended no benefit to them, but an authority only, by appointing a *quorum* out of the trustees.

A testator de-
vising an estate
to persons whom
he names trust-
ees, for such
purposes as they,

or the major part of them, shall think fit, gives no benefit to them, but is an authority only, by appointing a *quorum* out of them.

It is almost nonsense to say, that he did not intend to give it for charity, because vesting it in trustees, to give to such persons as they think fit, would be putting it in their power to sell the estate, and sink the money in their own pockets.

Therefore, this naturally leads me to look out for other particular passages in the will, to *such charitable uses and purposes*, in case his son die a minor, or without issue, so that the whole turns upon the same event, the son's dying a minor, and without issue.

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(1) *Ex parte Caswall*, ante 1 vol. 560. *Hal v. Carter*, ante 356. 505. *Southby v. St. Auboise*, 2 Ves. 612.

(2) With respect to the general rule as to resulting trusts, and the exceptions

thereto.—See *Hill v. T. Jessop of London*, ante 1 vol. 519. and the cases referred to in the notes.

(3) *Wile Read v. Smit*, post. 645. *Sherrard v. Lord Harborough*, ante 105.

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The expression in the codicil, "*upon such persons, and to and for such uses,*" are common words in devises to charity.

The defendants too are the very persons who are the trustees for charity in the residue of the testator's personal estate, and likewise for another real estate of 20 *l. per annum*.

All the objections arising from want of objects, or from certainty of time, are easily obviated, upon construing the testator's intention to be for charity; because, if the trustees have misapplied or abused their power, they might have been called to an account, at the relation of any person, in the name of the attorney general, for the benefit of the charity.

The defendants were directed to lay a scheme before the Master for applying the testator's estate to such charitable uses and purposes, as shall answer the intention of the testator (1); and also for the application and distribution of the money that shall be coming in out of the growing rents and profits, or out of the money that shall arise from any future sale; and in this scheme the defendants were to have a particular regard to the *poor relations* of the testator, and their circumstances (2).

(1) *Baylis v. the Attorney General*, *Moggridge v. Thackwell*, 3 *Bro. Cha. Rep. ante* 239. *De Costa v. De Pas*, *Amb.* 228. 517. seem to be cases of the same nature. *Attorney General v. Clarke*, *Amb.* 422. *Attorney General v. Herrick*, *Amb.* 712. (2) *Reg. Lib. A.* 1743. fol. 283. *White v. White*, 1 *Bro. Cha. Rep.* 12.

Case 329.

Wellington versus Mackintosh, May 13, 1743.

One partner brings a bill against another, to discover and be relieved against frauds, &c. the defendant pleaded an agreement, that in case any difference should arise between them, it was to be referred; and that the matters in the plaintiff's bill relate only to the partnership, and yet

THIS came on before the Lord Chancellor, on the defendant's plea, that the plaintiff and he, on the 15th of November, 1728, executed articles of co-partnership, by which they covenanted to become joint traders, as *Blackwell-hall* factors, for eight years, and agreed, in case any difference should arise relating to their business, or of any covenant in the articles, it should be referred; and avers, that all matters in the plaintiff's bill relate only to the partnership, and that they have never been submitted to arbitration, nor did the plaintiff ever propose a reference, or nominate any person to be an arbitrator, though the defendant offered, and was always ready to submit all matters to arbitration, and demands judgment, if he shall further answer.

have never been submitted to arbitration, nor has he ever proposed a reference, though the defendant offered, and was always ready to do it. Lord Hardwicke disallowed the plea; for as it is a bill to discover and be relieved against frauds, the arbitrators cannot examine on oath, which, by the agreement, they should have had a power of doing.

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The plea ought to be disallowed in this case (1); and yet I could not have it understood, that such an agreement might be made in such kind of articles, and pleaded; but such a cause should have in it a power given to the arbitrators to examine the parties, as well as witnesses, upon oath (2).

But this bill is to discover and be relieved against frauds, impositions, and concealments, for which the arbitrators could not examine the parties on oath.

Persons might certainly have made such an agreement as would have ousted this court of jurisdiction, but the plea here goes both to the discovery and relief; and if I was to allow the plea to relief, I could not as to the discovery, and then the court must admit a discovery, in order to assist the arbitrators, which is not proper for the dignity of the court to do.

(1) But in *Halfbide v. Fenning*, 2 Bro. Cha. Rep. 336. such a plea was allowed. However, Lord Hardwicke's determination in this case has been since fully established by the cases of *Michell v. Harris*, after Term 1793. 4 Bro. Cha. Rep. 311. C. and *Satterley v. Robinson* in the Exchequer, 17th December, 1791. Vide

etiam Kill v. Hollister, 1 Wils. 129.

(2) *The Master of the Rolls* in *Halfbide v. Fenning*, 2 Bro. Cha. Rep. 336. observes, that the opinion here attributed to Lord Hardwicke must be misreported, as the parties could not give the arbitrators a power to examine on oath.

Bagshaw versus *Spencer*, Hillary Term 16 Geo. 2. before the Master of the Rolls.

Case 330.

S. C. ante 246. post, 577.

1 Ves. 142. The Master of the Rolls, after taking some time to consider of this case, declared it was his opinion, that the devise in the will of A. to Benjamin Bagshaw, was in tail, and that he took such estate in a moiety of the premises, and consequently the recovery was well suffered, and barred all the remainders.

ONE Benjamin Abston, being seised in fee of several manors, lands, mines, &c. by his will duly executed, devised the same to William Spencer and others, their heirs and assigns, upon trust, out of the rents and profits, or by sale, or mortgage, to pay all the testator's just debts, and after payment thereof, he devised the same estates to three of the same trustees, their executors, &c. for 500 years, upon trust to pay the testator's legacies, and an annuity of 200*l.* a year to the testator's sister for her life: and after the determination of the said estates for years, he devised the same premises to all the said trustees, and their heirs, in trust, as to one moiety, (being the estates in question), to the use and behoof of his nephew Thomas Bagshaw, and during the term of his natural life, without impeachment of waste; and from and after the determination of that estate, he devised the same to the trustees for the life of Thomas Bagshaw, to preserve contingent remainders; and from and after his death, then to the use and behoof of the heirs of the body of Thomas Bagshaw lawfully begotten, and for want of such issue, then to his nephew Benjamin Bagshaw, for and during the term of his natural life, without impeachment of waste; and from and after the determination of that estate, to the same trustees for and during the life of Benjamin Bagshaw, to preserve contingent re-

Colt v. Howell
2 St. Tr. 142. 1. 186.
Briggs v. St. Cy
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mainders; and from and after his decease, then to the use of the heirs of the body of *Benjamin Bagshaw*, lawfully begotten, with like remainders to other nephews; and amongst other legacies, gave 1000*l.* to *Benjamin Bagshaw*, and appointed two of his trustees executors of his will.

Thomas Bagshaw dying without issue, *Benjamin Bagshaw*, in Trinity term 1731, brought his bill against the executors and devisees, and also against the heir at law of the testator, praying an account of the personal estate of the testator, and also of the rents and profits of his real estates, that his debts and legacies might be paid, and in particular the 1000*l.* legacy to the plaintiff *Benjamin*; that a commission of partition might issue, and that the plaintiff might be let into possession of a moiety of the estates.

To this bill the defendants put in their answers, and the cause being brought to a hearing in 1732, at the *Rolls*, his Honor decreed, that an account should be taken of the personal estate, and also of the rents and profits of the real estates, and of the debts and legacies of the testator, and that so much of the real estates should be sold, as should, with the personal estate, and the rents and profits of the real estates, be sufficient to pay all the debts and legacies; and a commission of partition was directed to issue, for dividing the real estates, or so much thereof as should remain after payment of the debts and legacies; and all further directions were reserved till after the Master should have made his report.

In 1737, the Master, to whom the cause was referred, made his report, and soon after *Benjamin Bagshaw*, the plaintiff, died, whereupon *Catharine Bagshaw*, his widow, devisee and executrix, brought a bill of revivor, and supplemental bill, upon the former proceedings against the surviving devisees and executors of the will of *Benjamin Ashton*, and also against the heir at law of *Ashton*, to whom the other moiety of the estates were devised, and also against the heir at law of *Benjamin Bagshaw*, and against *John Statham*, a devisee under the will of *Benjamin Bagshaw*, charging, by way of supplement, that *Benjamin Bagshaw* in his life-time, by bargain and sale inrolled, conveyed his moiety of the estates to *Wells* and *Hawkins*, and their heirs, to the intent that they, or one of them, might become tenant or tenants of the freehold of the said moiety, in order for the suffering a common recovery thereof, which was thereby declared should be to the use of *Benjamin Bagshaw* and his heirs.

That a common recovery was accordingly suffered, in which *Benjamin Bagshaw* was vouched, and being thereby made tenant in fee of the moiety left to him, he, by his will duly executed, devised to the defendant *Statham*, and his heirs, all his lead mines, and parts and shares of mines and mineral interests; and his moiety of the estate in question, to his wife, the plaintiff in fee, and appointed the plaintiff his sole executrix, and died, leaving the defendant *Fitzherbert* his heir at law.

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The several defendants having put in their answers to this bill of revivor, and supplemental bill, and the will of *Benjamin Bagshaw*, and the deed leading the uses of the recovery, being proved,

proved, the cause came on at the *Rolls*, for further directions upon the Master's report, and this supplemental matter; and the general question between the parties was, whether an estate tail, or an estate for life only, passed by the will of *Benjamin Ashton* to *Benjamin Bagshaw*; if an estate tail passed; it was allowed that he had made himself tenant in fee by the recovery, and had well devised the estates to the plaintiff, and the defendant *Statbam*; but for the defendant *Spencer*, the heir at law of the testator *Ashton*, it was insisted, that an estate for life only, passed; that the recovery *nihil operatur* to affect the remainder in fee, to the right heirs of the testator; and that *Benjamin Bagshaw* being dead without issue, he, as heir at law of the testator *Ashton*, was become well intitled to the estates in question.

Mr. *Noel*, counsel for the plaintiff, insisted on the general rule, that where there is a limitation to one for life, with a remainder in the same instrument, to the heirs of his body, it is an estate tail.

A testator, let his intention be what it will, must devise according to the rules of law; and cited *Soulle versus Gerrard*, *Cro. Eliz.* 525.

If the rule be right, the limitation to the trustees, to preserve contingent remainders, can make no difference.

In support of the rule, he cited *Shelley's Case*, 1 Co. 88. b. and *King and Melling*, 1 Ventr. 225. and observed, that in this case there was a power to make a jointure, and yet held to be an estate tail. *Broughton versus Langley*, 1 Lutw. 815. and *Goodwright and Pullin* (1), 13 Geo. 2. at a trial at bar, the limitation there was to the heir male of the body after a limitation for life, and held to be an estate tail.

He said, he had hitherto considered it as a legal estate, but the rule of equity is the same: Here is a trust vested, nothing required to be done by the trustees; and, to shew that trusts are to be governed by the rules of law, he cited *Bale versus Coleman*, 2 Vern. 670. *Legat versus Sewell*, 2 Vern. 551.

In every light, therefore, in which this can be considered, it appears to be an estate tail in *Benjamin Bagshaw*.

Mr. *Clarke*, of the same side, cited *Co. Lit.* 319. b. and *Bret versus Rigden*, in *Plowden* 340. *Shaw versus Weigh*, *Cas. in Eq. Abr.* 185.

Mr. *Wilbraham*, of the same side, cited *Watts v. Ball*, 1 P. W. 108.

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Mr. *Cox* for the defendant *John Statbam*, who stands in the same light with the plaintiff, insisted, that though the trustees in this devise have a power to sell the estates, which is performing the highest act of ownership, yet it hath constantly been held that they take only a chattel interest, and if so, it is clear that such estate and interest will not prevent a subsequent devise from vesting as an immediate estate, subject to and charged with the debts.

(1) 2 Lord Raym. 1437. S. C.

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And cited the following cases to this purpose. *Carter v. Barnardiston*, 1 P. Wms. 509. *Hutchins v. Hutchins*, 2 Vern. 403. *Trinity Term* 16 Geo. 2. the Master of the Rolls gave judgment.

Before I enter into what seems to be the main question; whether *Benjamin Bagshaw* took an estate-tail, or for life, by the will of *Benjamin Afbton*, I shall consider two things: First, whether this estate ought to be taken as a trust or a legal estate, and Secondly, whether the Master's report, that it is for the benefit of all parties the estate should be sold, will make any difference.

As to the first, I am clear of opinion that this is a trust-estate, and not a legal estate: it might have been otherwise, if no particular estate had been given to the trustees, and it had been given only for the payment of debts generally; and in this it differs from the cases of *Gore v. Gore*, 2 P. Wms. 28. *Stanhope v. Thacker*, *Prec. in Chan.* 435.

There is no doubt but that if an estate is devised to a man and his heirs to the use of him and his heirs, that this would be a use executed, and all the subsequent limitations would be trust-estates (1): and this is different from *Popham v. Bamfield*, 1 Vern. 79. for there the estate-tail was executed by the statute, and is like *Cordell's* (2) and *Manning's* case (3).

But as this is throughout called a trust-estate in the decree, that should further govern this case.

Then as to the other question, what difference the Master's report will make, *that the estates are proper to be sold for the benefit of all parties*; I think, though the estates were sold, it would not have given the court a handle to make a different determination, and the rather because a recovery has been suffered on which a new estate arose.

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The great question then will be what estate passed by the will of *Benjamin Afbton* to *Benjamin Bagshaw*, and whether he took an estate-tail, or for life only; and though I think this a case of great difficulty, yet upon the best consideration, I am of opinion, that he took an estate-tail.

Estates are to be governed by the same rules in law and equity, and technical expressions there to receive the same interpretation here.

And with regard to this, I shall take it as a settled maxim that estates are to be governed by the same rules in law and equity, and technical expressions at law are to receive the same interpretation, and in support of this many cases have been cited. *Watts v. Ball*, 1 P. Wms. 108. *Duke of Norfolk's* case, 3 Ch. Ca. 48. *Cowper v. Cowper*, 2 P. Wms. 720. *Philips v. Philips*, 1 P. Wms. 35. *Pierce v. Read*, *Pollexf.* 29. *Hopkyns v. Hopkyns*, 7 March, 1731 (4). *Maffingburg v. Afb*, 1 Vern. 234.

Now it is insisted for the plaintiff that this is an estate-tail, upon the rules, that where lands are limited to a man for life with limitation in the same deed or gift to the heirs of his body,

(1) *Popham v. Bamfield*, 1 Vern. 79.
Broughton v. Langley, 2 Salk. 679.

(2) *Cro. Eliz.* 315. S. C.

(3) 8 Co. 94. b. S. C.

(4) *Ca. temp. Talb.* 44. ante 1 vol. 581, S. C.

that

that this makes an estate-tail; and for this was cited 1 *Co. Shelly's case*, &c. *Smy v. June & al*, *Cro. Eliz.* 219.

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And it hath likewise been insisted, that a devise of lands in the same way passes the same estate; and for this have been cited several cases. *King v. Melling*, 1 *Ventr.* 225. *Soule v. Gerrard*, *Cro. El.* 525. *Bail v. Coleman*, 1 *P. Wms.* 143.

In answer to this it hath been insisted, that those rules are merely artificial, not founded in justice, but for support of the feudal tenures; and that it being contrary to justice, judges ought, from the common sense of the case, according to Lord Hobart's rule, to shew themselves *astuti*, in finding out reasons to support exceptions to such rules; and several cases have been cited in support of this, particularly *Lisle v. Grey*, *Sir T. Jones* 114. *Raymond* 315, and 2 *Lev.* 223. Sir Thomas Jones says in his report, that judgment was for the defendant: but that is a mistake, as appears from the reason of the case, which is contrary, and so are the other books; and though it is said in *Jones's Reports* this judgment was reversed, yet that is a mistake, for in *Legate v. Sewell*, in 1 *P. Wms.* 87. it appears Mr. Justice Tracy had examined the record, and found that the judgment was affirmed. *Vide* 2 *Vern.* 43. *Peacock v. Spooner*. To the same purpose also was cited *Daffern v. Daffern*, 2 *Vern.* 362. *Hodgeson v. Buffey*, the 5th of December 1740 (1), and it is insisted from all these cases that the intention of the parties may even on deeds, and much more on wills, be taken as an exception to this rule, and one other case is cited to this purpose of *Trevor v. Trevor*, 1 *P. Wms.* 622.

Sir Thomas Jones
in his report of
Lisle v. Grey has
intirely mistaken
the case.

The next cases are those which have been adjudged and determined in cases of wills, on which the rule of judging by the intention of the testator hath been insisted on; and for this hath been cited *Boraston's case*, 3 *Co.* 19 a. and *Phowden* 414.

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And upon the general question hath been cited *Clark v. Day*, *Moore* 593. *Lodington v. Kime*, *Eq. Caf. Abr.* 183. *Backhouse v. Wells* (2), cited in a case in a book called *Modern Cases*, 181. *Leonard v. The Earl of Suffex*, 2 *Vern.* 526. which case was mentioned on both sides. *Lord Glenorchy v. Bosville*, *Cases in Lord Talbot's time*, 3. *Sands v. Dixwell*, December 8, 1738 (3), *James v. Richardson*, *Pollex.* 457. *Lord Stamford* and Sir John Hobart on Serjeant Maynard's will, December 19, 1709 (4).

But the nearest case of all, and which is insisted to be in point with the present, is *Papillion v. Voyce*, 2 *P. Wms.* 471.

These are the several cases that have been cited for the defendant, and I shall now consider how far they come up to the present case, and then how far the intent is to govern in cases of deeds, and likewise how far it isto prevail in cases of wills.

On deeds the rule is certain, and I hope always will be the same, that they shall be controuled by the rules of law, and the

Deeds are to be
controuled by
rules of law, and
the intent that
appears on the face of them.

(1) *Ante* 89. S. C.

(2) 1 *Eq. Ab.* 184. pl. 27. S. C.

(3) *Ante* 1 vol. 607. S. C.

(4) 1 *Bro. P. C.* 288. S. C.

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intent that appears on the face of the deeds; for to admit of other constructions would let in the greatest uncertainty, as we find every day in the construction of wills.

As to *Lisle v. Grey*, it differs from this case in respect of the superadded clause.

The cases of *Daffern v. Daffern*; *Peacock v. Spooner*, &c. are all different; so is *Trevor v. Trevor*: though they are to be sure authorities, for what they determine; besides the reasons in those hold not in the case of wills.

How far then is the intent of the testator to be observed?

The intent of the testator must be consistent with the rules of law, and in many cases his intent has been restrained, as where he has attempted a perpetuity, or to restrain a tenant in tail from alienation.

It is laid down in general, that it is to be observed; but then it is laid down as general too, that this must be consistent with and according to the rules of law; and if this was not adhered to, the greatest uncertainty and inconvenience would follow.

When a testator expresses himself in inaccurate words, but shews his intention, the law, as Lord *Coke* says, shall be his counsellor; and this is what I take to be the meaning of *Plowden* 414, and there are many cases wherein an intent is so restrained, as where a perpetuity is attempted to be made, or a restraint of alienation put on tenant in tail, &c.

Words that are doubtful, and afford implication only, are not to be attended to, where the testator has expressed himself in legal words.

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*Where the testator expresses himself in legal words, they are not to be left, to follow the intent arising by other words that are doubtful, and afford implications only; for when we quit a clear and settled rule, which the law sets up for our guide, and follow such intent, we leave certainty for uncertainty; and we must now take the law to be settled, that where the issue take by purchase, it gives the ancestor an estate for life only; but the cases cited for this do not come up to the present, for here is no devise over to the heirs of the body of the issue, as was in those cases of *Lisle and Grey*, and *Backhouse versus Wells*; and in the case of Lord *Glenorchy versus Bosville*, and *Sands versus Dixwell*, the lands were devised to the trustees to convey, which made it executory, and altogether different from this case.

Asb versus *Rouse* was of a devise of money to be laid out in lands; which differs from the rule in *Shelley's case* and *Co. Litt.* 376. b.

But the present case is an immediate devise, and not of a devise of lands to be settled.

As to *Papillion versus Voyce*, 1 *P. Wms.* 471. (which I have left to consider last, because most material) the devise is the same, only there it is of a legal estate, this is of a trust; but that, as I have said before, I shall consider as making no difference.

And had this case stood unimpeached, I should have been very unwilling to have departed from it, whatever might have been my opinion; but in *P. Wms.* it appears plainly that Lord Chancellor *King* was of a different opinion, and, if the supplemental

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mental bill had not been brought, would have reversed the decree, and so it rather stands an authority for the plaintiff; and there is another report of this case, where it is said at the end of it, that in the case of *Williams v. Brown*, Lord King had declared he should reverse the decree. *Vide Cases in Chancery*, printed in 1740. page 24.

Then consider if this devise be executory or not, though all trusts are in some sort executory, yet it is well understood what an executory trusts is (1).

As to the debts, it cannot be executory, because the trustees can sell no more than is sufficient to pay the debts, nor is there any provision for laying out the surplus money; for after the debts and legacies are paid, the devise is immediate, and it is the will I ought to go by, and not what hath happened since on the decree and the Master's report.

Consider then the construction of the words of this will, and then let us examine what the effect is of the limitation to the *trustees to preserve the contingent remainders, the words without impeachment of waste give a power not inconsistent with an estate-tail, or at least would not defeat the estate, as said by Lord Talbot in the case of *Lord Glenorchy versus Bosville*, and in *Shaw versus Weigh* (2), no weight was laid on these words to restrain the estate, and if words can have a reasonable construction not to defeat estates, they ought to be so taken.

The words, without impeachment of waste, do not give a power inconsistent with an estate tail, or at least will not defeat it.

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As to the intent, from the limitation to the trustees, to preserve contingent remainders, they do not with certainty shew an intent not to give an estate-tail, and might be inserted with no such reason (3); we see the words inserted frequently where there could be no reason for them, and the testator might think this limitation necessary to create an estate-tail, or might have inserted the words to restrain an alienation by the tenant in tail, which if it had been expressed could not, as in the case of *Leonard* and the earl of *Suffex*, have taken effect.

Great inconveniences have arisen by departing from strict words, from the uncertainty it produces, and I could wish that it had never been allowed, but that words had been left to legal construction.

Departing from strict words has produced such uncertainty that it is to be wished

they had been left to legal construction.

The Master of the Rolls declared the devise in *Ashton's* will was in tail to *Benjamin Bagshaw*, and in consequence thereof that the estate should be sold, and the money arising from such sale be paid to such person as would have been intitled to the estate itself under *Bagshaw's* will, if it had not been sold.

(1) *Vide* 1 *Fearne*, 205. and *seq.* 4th edit.

(2) 1 *Eq. Ab.* 184. pl. 28. S. C. *ante* 305.

(3) *Vide post.* 579.

Cafe 331. *Bagshaw versus Spencer, November 12, 1748, on an Appeal from a Decree at the Rolls.*

Ante 246, 570.
2 Vef. 142.

Lord Hardwicke being of opinion that Benjamin Bagshaw took only an estate for life, he reversed the decree at the Rolls, *pro tanto* as decreed that Benjamin had an estate tail.

LORD CHANCELLOR. Nothing which has happened since the will of Benjamin Afton can vary the will, but the rights of the parties must stand as they were at his death; and if a surplus of money arising from the sale of the lands is now to be laid out, it must be in the same manner as if the lands originally were now to be settled.

Neither can the recovery suffered by Benjamin Bagshaw, or his will, be of any signification, for the determination must be the same as if Benjamin Bagshaw had been living, and prayed a conveyance of the moiety himself, according to Benjamin Afton's will.

There are two general questions upon this will :

First, Whether the estate devised to Benjamin Bagshaw was a trust, or a legal estate, that is, a use executed, or a mere trust in equity ?

The estate devised to Benjamin Bagshaw was not an use executed, but a mere trust in equity, and the whole fee being devised to the trustees, no legal fee could be limited upon it, and he could take no legal estate.

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Secondly, If it is a trust, whether an estate-tail passes, or an estate for life, with contingent remainders to all the issue of his body.

As to the first question, I am of opinion it is merely a trust in equity.

The devise is to trustees and their heirs ; which carries the whole fee in law ; the devise to sell would have carried the fee, if the word *heirs* had not been mentioned (1). *Shaw versus Weigh, Eq. Caf. Abr. 185. April 28, 1729.*

And upon this ground the case differs from *Cordell's case, Cro. Eliz. 315*, and *Popham versus Bampffield, 1 Vern 79*, and *Carter versus Barnardiston, 1 Wms. 505*, which were all merely chattel interests (2).

The only case which made me doubt was the case of *Lord Say and Seal*, but that was only an estate *pur auter vie*.

In the present case the whole fee being devised to the trustees, no legal fee could be limited upon it, and Benjamin Bagshaw could take no legal estate (3).

(1) Because the purposes of the trust could not be answered unless the fee passed. *Villiers v. Villiers, ante 72. Gibson v. Montfort, 1 Vef. 491. Amb. 93. S. C. Oates v. Markham, 3 Burr. 1684. Roberts v. Dixwell, ante 1 vol.*

608. *Sheppard v. Gibbons, ante 441. Wright v. Pearson, Amb. 362.*

(2) So *Trodd v. Downes, ante 304.*

(3) *Hopkins v. Hopkins, ante 1 vol. 591.*

Next as to it's being good by way of executory devise : by executory devise, *Benjamin Bagshaw* could take no legal estate, for it is too remote, it being after all the debts paid, which may take in a much further time than the law allows : but here the recovery was suffered before the debts were paid, and before the fee was ended, and therefore he could make no good tenant to the *præcipe*, and whatever defeats the recovery defeats the plaintiff's title : the plaintiff therefore must admit that all the estates are trusts in equity ; which brings in the second question ;

Whether this is an equitable estate for life only, with contingent remainders, or an estate-tail ?

And this depends upon the construction of the words *heirs of his body*, whether they are words of purchase or limitation.

Here are three things to be considered :

First, What appears to be the testator's true intent ?

Secondly, If such intent is consistent with the rules of law and equity.

Thirdly, whether there is any particular settled rule which will prevent the testator's intent from taking effect, which will let in the distinction of trusts executed and executory.

As to the first question, what is the testator's true intent ?

It is extremely clear that he intended to make a strict settlement of his estate among his nephews.

To every one of his nephews he uses the words, *for and during his natural life*.

To every devise is added *without impeachment of waste*, which shews he intended to give such an estate as would be punishable for waste, if not excepted (1).

The limitation is to trustees to preserve contingent remainders, &c. but to permit *Benjamin Bagshaw* to receive the profits, &c.

This clause speaks, that the testator intended such an estate only, as might be forfeited : for the limitation to the trustees, is, after the determination of the estate, &c. which determination could be only two ways : by death, or forfeiture : and the former could not be meant, because the limitation is to trustees during the life of *Benjamin Bagshaw*.

It also implies that there are some contingent remainders or uses to be preserved (2), and there are none, unless the limitations to the heirs of the bodies of the several nephews are such, which, I think, is as strong to shew the testator's intent, as if he had inserted some negative words equally strong ; as in the cases of *Backhouse* versus *Wells*, *Eq. Caf. Abr.* 184, and *King* versus *Melling*, 1 *Ventr.* 225, to give an estate for life not absorbed in the subsequent limitations.

(1) *Vide ante* 305. 576.

(2) With respect to the reasoning of Lord Hardwicke in this place, Lord *Thurlow*, in the case of *Jones v. Morgan*, 1 *Bro. Cha. Rep.* 221. observes, " One cannot but be rather astonished to hear

"grave and learned men reason, that testators were acquainted with the rules and effects of contingent remainders, and yet did not know how to give a contingent remainder in proper form."

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Benjamin Bagshaw's recovery bad, for he could not make a good tenant to the *præcipe*, being before the debts were paid, and the fee devised to the trustees was ended ; and whatever defeats the recovery, defeats the plaintiff's title.

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The plaintiff's counsel relied upon the testator's knowing the difference between words of limitation and purchase: and that in the other moiety of the estate he had devised it properly to create an estate for life, by giving it to his sister and the heirs of her body and the issue of such heirs.

But I think the difference of the penning, shews a different intent.

For there he has inserted no limitation to trustees to preserve, &c. which shews he intended to make use of the words *heirs of the body* as words of purchase or description only.

Secondly, I am to consider if this intent can take effect.

Here the counsel for the plaintiff placed their great strength, that ever since *Shelley's Case*, 1 Co. 93. b. the law has settled a clear rule, that, in such case, the word *heirs* is a word of limitation, and that the law will not suffer any man to make a devise, contrary to the rules of law.

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But I think that rule is now misapplied: This principle is not to be applied to the construction of words, but to the nature of the estates themselves.

As the law will not permit a man to create a perpetuity, or to make a chattel descendible to heirs generally, which arises from a want of power in the testator; but here is no want of power in the testator to give such estate for life; the only objection is, that he has used improper words.

Where a testator's intent appears plain, this court will help an unapt expression, by making the words *heirs of the body*, words of purchase.

Heirs of the body have, at law, been considered as words of purchase, even in a deed.

But to make that defeat his intent is very hard, and contrary to the first rule of law in expounding wills, viz. That if the testator's intent appears plain, as he is supposed to be *inops concilii*, the law will help an improper and unapt expression, which cannot be done here, but by making the words, *heirs of the body*, words of purchase.

The objection is, That by law these are words of limitation.

I answer, There are many cases, even at law, where they are words of purchase, *Archer's Case*, 1 Co. 66. b. *Clark versus Day*, Mo. 593. 1 Vent. 334. *Long versus Beaumont* (1).

And, upon this point, the case of *Lisle versus Grey*, is a stronger authority, in 3 Lev. 323, it is reported different from Sir Thomas Jones, as to the estate decreed, and the decree was not reversed, but affirmed.

An objection was raised, *There were several other words which might govern that case, as the first and every other son were mentioned.*

I answer, *It is an authority, that the words, heirs of the body, even in a deed, may be considered as words of purchase at law.*

The essential difference between this case, and *Coulson versus Coulson*, is, that was a mere legal estate, the present, a trust in equity.

But it is said, that, by a late authority, the interposition of trustees to preserve contingent remainders, is not sufficient to make these words, words of purchase; the case of *Coulson versus Coulson* (2), in the Court of King's Bench, the 8th of May, 1744, which was the date of the Judge's certificate, but that case differs widely from the present: That was not without impeach-

(1) 1 P. W. 229. S. C. (2) Ante 246. S. C.

ment of waste; it was a mere legal estate, not a trust; and the words were to be taken according to their legal operation, there was no conveyance to be made, or any thing further to be done.

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But here, all the limitations are the directions of a trust, which his court is bound to carry into execution, according to the intent of the testator.

*And therefore a greater latitude is to be allowed in the construction to make it agree with the intent of the testator.

In construing
words, to make
them agree with
a court of law.
[*581]

the intent of the party, a court of equity is more liberal than

And in *Coulson versus Coulson*, the judges held, that the interposing the limitation to trustees prevents the merger of the estate for life, and that *Coulson* took a distinct estate for life, with a remainder in tail in himself.

The great difference is, that was a mere legal estate; the present case is a trust in equity.

It has been relied upon, that limitations of trusts and legal estates are governed by the same rules, otherwise there would be different rules of property in the two courts (1).

I agree, that there ought not to be one rule of property in law, and another in equity: but, sure a court of equity may be more liberal in the construction of words, to make them agree with the intent of the party.

And Lord *Nottingham's* reasoning is to be applied to the measure of the limitations, that they cannot be carried further in cases of a trust, than at law.

Papillon versus Bois, Eq. Cas. Abr. 185, establishes the distinction of a legal estate, and a trust in the same case, and upon the same will.

There, both the judges were clear of opinion, that the testator's intent was plain to give an estate for life only, from the clause to preserve contingent remainders, and that the court was bound to follow that intent, notwithstanding the words *heirs of the body*.

The opinion Lord Chancellor *King* gave, was a sort of ex-ajudicial opinion; but, taking time to form his decree, he said, he had looked into the case of *Lisle versus Grey*, and seemed to be less clear as to the legal estate than before; but as the supplemental bill had brought a new right, he took care to express; that the direction to reverse that part of the decree, as to deeds, &c. was expressly founded upon that supplemental bill.

Leonard versus Com' Sussex, 2 Vern. 526. If this had been a legal estate, the sons would have been tenants in tail; but in equity, upon a trust estate, the clause for interposing trustees, &c. governed the whole case.

(1) *Ante* 574.

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On the construction of Serjeant Maynard's will, heirs of the body were held to be in the sense of the first and every other son.

Sir John Hobart versus *Lord Stamford* (1), on the construction of Serjeant *Maynard's* will: This court, and the House of Lords, construed the words *heirs of the body* in the sense of the first and every other son.

It is established, that in a will, the word *issue* is as strong as the word *heirs*.

Ashton versus *Ashton* (2), at the Rolls, November 14, 1734. A strict settlement was decreed, the words there were *issue of the body*, not *heirs*; but it has been established, that in a will, the word *issue* is as strong as the word *heirs* (3).

In *Withers* versus *Algood*, July, 1735 (4). An estate for life only was decreed.

An objection was taken, That there the words *heirs of the body* of *A.* were joined with other persons, who clearly must take by purchase.

I answer, It amounts only to this, that a plain intent of the testator will change these words from being words of limitation, to words of purchase; and Lord *Talbot* said, the rule of law was not so strict, as to controul the testator's intent, where it is plain.

The distinction of trusts executed and executory, established in *Lord Glenorchy* and *Bosville*.

Lord Glenorchy versus *Bosville*, *Cas. in Eq. in Lord Talbot's time*, 3. has established the distinction of trusts *executed* and *executory*.

It was objected for the plaintiff, that in cases of articles before marriage, the court will make such construction, as may answer the intent of the party; but in wills, where all parties are volunteers, the court cannot take such liberty.

Notwithstanding all the parties are volunteers under a will, it is not necessary, the words must be taken as they are, but, in many cases may be varied.

It is true, such distinction has been taken, notwithstanding it has been objected, that the intent of the parties ought to be observed in both; but I deny that, because all parties are volunteers under a will, the words must be taken as they are, and cannot be varied from: nay, in many cases they must be varied; as where the court is obliged to direct a conveyance; for, if they were to use, in such conveyance, the same words as are in the will, they would, in a deed, have a different construction from a will, and thereby frustrate the testator's intent.

Issue in a deed is always a word of purchase.

The word *issue* in a will may be a word of limitation, but in a deed is always a word of purchase (5).

An objection has been raised, that these cases arising upon wills, are very different from marriage-articles, where the parties are considered as purchasers, and the issue male particularly regarded, and take as purchasers; but that no case has been cited of a will, where all parties claim voluntarily; and the same words of limitation in a will, ought to receive the same

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(1) 1 Bro. Par. Ca. 289. S. C.

(2) S. C. cited 1 Vesf. 149.

(3) *King v. Melling*, 1 Vent. 214. 225. *Glenorchy v. Bosville*, *Ca. temp. Talb.* 10.

(4) S. C. cited 1 Vesf. 150. from the

Register's book. 2 Vesf. 648. S. C. 2 Burr. 1107. S. C.

(5) *Co. Litt.* 20 b. *Nevill v. Nevill*, 1 Roll. Ab. 837. R. pl. 1. *Makepiece v. Fletcher*, Com. Rep. 457.

construction

construction in equity as at law, even where they are to be carried into execution by a future trust, so as to create an equitable estate.

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SPENCER.

I answer, The first part of the distinction is right, but not applicable to the present case.

And I think, in the case of *Baile versus Coleman*, 2 Vern. 670 (1), the precedents were not fully laid before Lord Chancellor Cowper, a great many of which have been cited in this present judgment.

Next, as to trusts *executed* and *executory*.

All trusts are in the notion of law executory, and are to be executed in this court (2).

At law, before the statute of uses, every use was a trust, then the statute executed the legal estate, and joined it to the use, and therefore a trust executed is now a legal estate; and to bring it to a trust in equity, the legal estate must want to be executed by a conveyance.

The Statute of uses has executed the legal estate, and joined it to the use; and the legal estate therefore must want to be executed by a conveyance to make it a trust in equity.

executed by a conveyance to make it a trust in equity.

The case where this was most argued, was the case of Lord *Glenorchy versus Bosville*.

But there is another question, How far in trusts executory the testator's intent is to prevail over the strict rule of law? And I think the decree in that case so right, it did not want the assistance of such distinctions.

Testators are generally presumed to know, that some further conveyance of the estates devised to trustees must be made, for they cannot presume, the estates will always remain in their trustees, but must be by them conveyed to other persons, according to the tenor of the will.

There is one thing more that is decisive in this case; nothing which has happened since *Aston's* death can vary the case, but it must be the same as if *Benjamin Bagshaw*, the first devisee, came for a decree; and if he had been the plaintiff now, the court must have decreed the surplus to be laid out in land, one moiety to the use of *Benjamin Bagshaw*, with remainder over; and the question would have been, Whether the court would, or would not, have inserted trustees to preserve contingent remainders in such conveyance: if they had been inserted, the next limitation must have been to the first and every other son, in strict settlement; for if they had been inserted, there must have been some remainders for them to preserve; and if the remainders had been to the heirs of the body of *Benjamin Bagshaw*, it would not have been a remainder to have been preserved.

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And therefore the court must have departed from the words of the will; and if it must depart from the words of the will,

Where the court are obliged to depart from the

words of a will, it should rather be to support, than to frustrate the intention of the testator.

(1) 1 P. W. 142. S. C.

(2) See *Hopkins v. Hopkins*, ante 1 vol.

394- But see Mr. *Fearne's* observations

on Trusts *executed* and *executory*, 1 *Fearne*, 205 to 218. *edit.* 4th.

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such departure must be rather to support, than frustrate the plain intent of the testator, and to have limited the remainder to the heirs of the body of *Benjamin Bagshaw*, would plainly have contradicted the testator's intent.

An *objection* was started, That if the court departs from the words of the will, it ought to adhere to the legal operation of the words.

I answer, that cannot be in the present case, without giving to *Benjamin Bagshaw* a different legal estate from the estate given him by the words of the will.

By the will, it is a life estate, not united with the remainders; but, by leaving out the clause of the trustees, it would have been an immediate estate-tail.

By the will, it is an estate liable to forfeiture.

By the conveyance an estate tail not liable.

For these reasons I am of opinion, *Benjamin Bagshaw* took only an estate for life, and that so much of the decree at the *Rolls*, as decrees *Benjamin Bagshaw* to have an estate-tail under the will, must be reversed (1).

(1) *Reg. Lib. A. 1748. fol. 152. Garth v. Baldwin, 2 Ves. 646. Wright v. Pearson, Amb. 358. 1 Fearn, 187. S. C. Austen v. Taylor, Amb. 376. Jones v. Morgan, 1 Bro. Cha. Rep. 206.* To use the words of Mr.

Fearn, "It seems difficult, after the last cited cases, to speak of the authority of *Bagshaw v. Spencer* otherwise than as an anomalous case, applicable (if at all) only to its *fac simile in specie et terminis*." 1 *Fearn*, 205. 4th edit.

Case 332.
S. C. 3 P. W.

Wrottesley versus Wrottesley, June 1, 1743.

335.
The words under the marriage settlement, such child as married without the father's consent should forfeit the said intended portion, extended to the whole interest each child might expect under this settlement, whether certain or contingent (1).

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A Question arose on the marriage-settlement of Sir *John Wrottesley*, who created a term for years, in trust, "to raise and pay, if one child, only 6000*l.* if two, 6000*l.* to be equally divided; if three, or more, 8000*l.* to be equally divided, and to be paid at their respective ages of twenty-one, or marriage; and it was provided, that if any of the said younger children should marry in the father's life-time, without his consent, and, after his death, without the consent of the mother, such child should forfeit his or her said intended portion, to be distributed among the rest, at the age of 21, or marriage, with such consent; with a farther proviso, that if any such child should marry without such consent, or die before twenty-one, or marriage with consent, the portion to be divided among the survivors, of the age of twenty-one, or marriage with consent."

Francis, one of the daughters, married with Mr. *Bendish*, without the consent of the mother; and on hearing of the cause before Lord *Talbot*, on the 6th of August 1734, it was held,

(1) So *Chauncey v. Gaydon*, post. 616. and the note at the end of that case. See also *Harvey v. Aston*, ante 1 vol. 361.

that

that she had forfeited her portion, by such marriage, and was decreed to the other children.

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One of the daughters is since dead, before twenty-one, or marriage; and the petitioner, Mr. *Bendish*, who married *Frances*, applies now, in the right of his wife, who is twenty-one, for her distributive share of her sister's contingent portion.

The question is, Whether *Frances*, as she has forfeited her original portion, is intitled to a share of this contingent portion, on the death of her sister, before twenty-one, or marriage.

Mr. *Wilbraham*, for the petitioner, who was not twenty-one when she married, but arrived at that age before her sister died, cited the case of *King versus Withers* (1), as a case in point.

Mr. Attorney General, counsel for the other sisters, insisted, that the whole term, and the whole 8000 *l.* was under consideration when the cause came before Lord *Talbot*, and that he expressly declared *Frances* is not intitled to any share of the 8000 *l.* which must mean, that she had no interest at all, and could not possibly intend that she had a contingent interest.

If the intention of the parties to the settlement, was plain to give the portion over on marrying *without consent*, the court will not strain to construe it no forfeiture.

The whole tenor of the settlement is, that none of them should be intitled unless they had performed the conditions.

Mr. Solicitor General, in reply for the petitioner said, that the clause of forfeiture does not at all affect the contingency which has happened.

The said intended portion is the only thing which is to be forfeited, and can mean only what she is intitled to at the commencement of the term, nor are there any words whatsoever, that give over any share that might accrue afterwards, by the death of one of the daughters before twenty-one, or marriage.

That *Frances* is intitled to this distributive share, because one of the contingencies has happened since her attaining the age of twenty-one, and she may yet marry a second husband with consent.

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LORD CHANCELLOR,

As this is the case of a forfeiture of a marriage portion, the court will make as favourable a construction as possible.

For, as Mr. Solicitor General said, if this had been *casus omisus*, the court would let it lie where it is fallen, and not take it from *Frances*; at the same time I must make such a construction, as will suit the intention of the parties.

It has been objected by the defendant's counsel, that the petitioner is precluded, from what is demanded by the petition, by Lord *Talbot's* decree.

But this will not hold, because the terms of the decree are, *That Frances Bendish having married Higham Bendish, after the death of Sir John Wrottesley, without the consent of Lady Wrottesley her mother, is not intitled to any share of the 8000 l.*

(1) *Ca. temp. Talb.* 117. 3 *B. W.* 414. S. C.

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The declaration of the court being in the present tense (1), cannot be extended so far as to exclude any thing she might be intitled to by a subsequent contingency, if within the terms of the trust.

The rather because the rest of the daughters were not intitled at the time of the decree, being all under age, and therefore all were at liberty to apply to the court for further directions, and the application left open to Mrs. *Bendish*, as well as the rest.

But, however, the counsel are right as far they have argued from the reason of the decree, which brings me to the construction upon the trust itself: Now, as to this, it depends upon the frame and tenor of the whole trust.

There is one thing pretty extraordinary in the petitioner's demand, which is his claiming a gross sum of 2000*l.* the whole of her original portion, for 8000*l.* was all the provision under the settlement, if more than three children.

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What is the effect of this? Why, that notwithstanding she has forfeited her original portion, yet they will take back as much as the original portion they have forfeited, which would be a great absurdity, and therefore must be laid out of the case, for they cannot claim a fourth part of the original portion as it is given over: Therefore the question is reduced singly to a fourth part of the deceased daughter's fifth, and this must depend upon the clause of forfeiture.

First, What is the meaning of *his* or *her* said intended portion.

Now I do not think that the word *said* can be narrowed so far, as to relate only to the original portion; for the word portion or portions in this clause or declaration of trust does not mean the original portion only, but the whole interest which each child might expect under this settlement, whether certain or contingent.

If it rested singly upon the clause of forfeiture, I should be of opinion the petitioner is not intitled, but if you go on to the next clause it is still plainer.

Here it is not *in terrorem* only, but a legal determination of the term, and the court cannot set it up again.

Suppose the other three sisters had married under age and without consent, would not the term have determined; can it be insisted then that the two sisters marrying with consent shall keep the term on foot for the petitioner's benefit, when the whole term would have ceased, if they had all married without consent.

As to the part of Lord *Talbot's* decree, that gives Mrs. *Bendish* the sum which the father has left by his will to make up any deficiency in his childrens fortunes, I think it a very proper direction, and should have been of the same opinion, because it would be very hard to extend the words *make up* to a forfeiture if a daughter married without consent; it could not be so construed unless the father had repeated the words in the settlement

arrying *without consent*; upon the whole circumstances he dis-
 missed the petition.

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Pullen versus Ready, et c con', January 8, 1743.

Case 333.

THE question in this cause arose upon the will of *Colston* in the year 1720. 1 Will. 21. S.C.

Edward Colston "devises several messuages, lands, &c. to five trustees and their heirs, in trust for his grand niece *Sarah Colston* for her life, with limitations to her sons and daughters in tail (1), and the last remainder in trust for *Mary Edwards*, and her sons and daughters in tail."

C. by his will gives legacies to his nieces, to be paid to them at 21, or marriage, which shall first happen, provided they marry with

the consent of their father and mother, or the survivor of them; otherwise to sink into his personal estate. The legacies vested at their attaining the age of 21, and either of them marrying without consent afterwards is of no consequence; for Lord Hardwicke held that the marriage with consent of father and mother must be construed so as to relate to the time of the legacies vesting.

He gives several pecuniary legacies (*inter alia*) "he says, I give to my cousin *Mary Edwards* 500*l.* to be put out to interest for her separate use; and after her decease I appoint the said principal sum of 500*l.* to be paid to her daughter *Sophia* at her day of marriage or twenty-one, which shall first happen. *Item*, I give to her daughter *Mary* 800*l.* and I further give to her sister *Sophia* 500*l.* which said several sums shall be paid to them at their ages of twenty-one, or day of marriage, which shall first happen, provided they marry with the consent of their father and mother, or the survivor of them, or otherwise their legacies to sink into my personal estate.

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"*Item*, it is my will, and I do hereby declare, that if the said *Sophia* and *Mary*, daughters of my said niece *Mary Edwards*, or either of them, shall hereafter marry with any person or persons whatsoever without the consent of their father and mother and the trustees named in the said will, or the greater number of them living, signified under their hands; then it is my will, that such of the daughters so marrying shall have or receive no more benefit or advantage by my said will, or any thing therein contained, than if they were actually dead, or not named in my said will, either by particular names or daughters in general."

Sarah Colston dies without issue unmarried. *Mary Edwards* died issue three daughters, *Sarah*, *Mary*, and *Sophia*. *Sarah* married in the life-time of the testator in a manner disagreeable

See Colston
Richardson
3 M. & H. 176
Scarborough
Doe dem. Jar
3 Add. C. Ellis.
Mary Harvey & Cook
Russell. 3 Ho.
Thomson
Stewart
C. Clark & S
912.
Himelthagen v/o
1 Collyer. 335

(1) Remainder as to one moiety to *ancis Colston* (one of his executors) for life, remainder to his sons and daughters in tail, remainder to *Mary Edwards* and her sons and daughters in tail: remainder as to the other moiety, to *Mary Edwards* and her sons and daughters in

tail, remainder over. The testator directs the residue of his personal estate to be laid out in the purchase of lands to be settled to nearly the same uses. The lands were charged with debts and legacies.

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READY.

being very general) having no devise over attending upon it, must be considered only *in terrorem*, and therefore no forfeiture ensues, and may be laid out of the case (1).

I must consider it then with regard to the *real* estate (2).

To be sure the ecclesiastical court have no jurisdiction here, nor has it ever been applied to conditions annexed to real estates: there might perhaps be some doubt as to the money, but as this court considers money directed to be laid out in land, as land (3), this is likewise exempt from the ecclesiastical law.

One question has been started, what would be the consequence of this forfeiture with regard to the real estate, and who can claim the benefit of it.

It has been insisted by the counsel for Mr. Pullen, that here is something in the nature of a cross remainder; now if it rests only in the intention of the testator, that is by no means sufficient; for if a man devises to daughters as tenants in common, and there is no express devise over to the others upon one of them dying, or not performing a condition, the share of such daughter would descend upon the heir at law of the testator.

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The clause is thus worded, *that a daughter so marrying shall have or receive no more benefit or advantage by my said will, or any thing therein contained, than if she was actually dead*: the consequence of this is, that it will go, as the law would have said, to the right heirs of Mr. Colson.

After *Sophia Edwards*, now *Ready*, arrived at her age of twenty-one, she joined with her father in suffering a recovery, and declaring the uses of her share.

The force of a conveyance by common recovery to extinguish all conditions, powers and incidents annexed to an estate-tail, arises from hence, that the law considers it in the nature of a real action, and the recoverer is in by right.

The general notion of common recoveries is that it bars estates-tail, remainders over, and extinguishes all conditions and powers, and all incidents annexed to an estate-tail; indeed, as Mr. Attorney General said, it will not bar a mortgage, because that is to be considered as a charge upon the estate, and cannot be defeated; but the force of a conveyance by common recovery to extinguish all these powers arises from hence, that the law considers it in the nature of a real action, and the recoverer is in by right. *Vide* the case of *Page* versus *Heyward* in *Pigot* 170, and *Salk.* 570, which is in point (4): therefore all that was in possession at the time, is out of the question, and the condition as to that is barred: and as to the money not yet laid out in land, the articles of the 9th of July, 1737, have likewise barred any right that might have accrued from the forfeiture to the other two sisters upon Mrs. *Ready's* marrying without consent.

(1) *Belias v. Ermine*, 1 *Cha. Ca.* 22. *Semphill v. Layly*, *Pre. Cha.* 562. *Jeramis v. Duke*, 1 *Fern.* 20. *Daley v. Dehouverie*, ante 251. *Rynish v. Martin*, *post.* 3 vol. 330. *Elton v. Elton*, *post.* 3 vol. 504.
(2) *Vide Harvey v. Aston*, ante 1 vol.

361. 381. note 1.

(3) *Trelawney v. Booth*, ante 307. *Oldham v. Hughes*, ante 453. *Guidot v. Guidot*, *post.* 3 vol. 254. G. note.

(4) *Vide Gulliver v. Shuckburg*, 4 *Bart.* 1929. *Driver v. Edgar*, *Cowp.* 379.

For, at the time of the execution of the articles, it could not but be known that Mr. and Mrs. *Ready* married without consent, because Mr. and Mrs. *Edwards*, Lord and Lady *Middleton*, Mr. and Mrs. *Pullen* were all parties, and cannot possibly be supposed to be ignorant of this fact, which happened some years before.

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READY.

It is said they might know the fact, and yet not know the consequence in law: but if parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with consequence of law as to this point, and shall not be relieved under a pretence of being surprised with such strong circumstances attending it.

If parties are entering into an agreement, and the will out of which the forfeiture arose was lying before them and their counsel, while the drafts were preparing, the as to this point.

parties shall be supposed to be acquainted with the consequence of law

Besides, here is a departure from the will, for the articles are plainly different, being a conveyance to *Pullen* and his heirs, instead of an estate-tail given under the will.

So that with the knowledge of *the will*, and all the clauses in it, *the condition annexed*, and the *forfeiture*, the parties with their eyes open execute this deed.

It has been insisted chiefly by Mr. *Pullen's* counsel, that they executed the articles under a mistake (1).

There is nothing more mischievous than for this court to decree a forfeiture after an agreement, in which, if there is any mistake, it was the mistake of all the parties to the articles, and no one of them is more under an imposition than the other.

This court is so far from assisting to set up the forfeiture again, that they would rather rejoice at the agreement, because it has absolutely tied up the hands of the court from meddling in the question: and if I was to decree the forfeiture now, it would be making all agreements vain and nugatory: the case that comes nearest to the present is *Can* versus *Can*, before Lord *Macclesfield* (2).

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After an agreement has intirely settled all disputes between parties and their several rights, the hands of the court are so tied up, they will not enter into a question which might have been started, had there been no such agreement.

enter into a question which might have been started, had there been no

I must decree therefore *Pullen's* bill to be dismissed without costs, so far as it seeks any relief with regard to the forfeiture: and under Mr. *Ready's* cross bill, I shall direct the articles to be specifically performed, and to be carried into execution (3).

(1) *Vide Malden v. Meynill*, ante 8.

(3) *Reg. Lib. B. 1742. fol. 522.*

(2) 1 *P. W.* 727. See *Stapleton v. Stapleton*, ante 1 vol. 10. under the title of *Ready v. Colston*.

Lawyer & Brickmore
M. & Neen. 572
 Case 334.

Vailiant versus Dodomedé, May 16, 1743.

Though on a demurrer to a person's being examined as a witness, it has been over-ruled, a *subpœna* cannot be taken out against him for costs, yet the court will give them upon an application by motion. S. C. ante 524, 546.

MR *Briflow*, one of the sixty clerks, demurred to his being examined in a cause, for that he knew nothing but what came to his knowledge as clerk in court, or agent for the defendant.

And the demurrer having been over-ruled, the plaintiff now moved that Mr. *Briflow* might pay 5*l.* costs, or in default of payment to be suspended from being a sixty clerk.

There was a cross notice to discharge a *subpœna* which had been taken out for costs against *Briflow*.

LORD CHANCELLOR,

This is a new case, and there are two questions arising out of it.

First, Whether any costs can be obtained against a witness (upon such a demurrer being over-ruled) by way of *subpœna*.

Secondly, Whether it is in the power and discretion of this court to give costs by any order.

As to the First, there can be no *subpœna* for such costs; and this appears by Lord *Clarendon's* rules, which relate only to demurrers between parties.

But I am of opinion that the party is intitled to have costs upon application to the court; and if I was to lay it down as a rule, that no costs should be given in any case where a witness demurs, it would be of very bad consequence, and tend greatly to the delay of the proceedings in this court, in regard to publications; and in some cases it would be worth the parties while to put up such a demurrer for sake of delay; and I think the court may very well do this by way of analogy to the courts of common law.

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The satisfaction formerly for the non-appearance of a witness was by action only, but now the courts of law grant an attachment against him.

Though originally the party was left to his satisfaction by action, yet an law the court now grants an attachment against the witness for not appearing, and he shall not be discharged till he has paid the costs.

As to the merits, I think it a proper case to give costs in; for it appeared to me upon arguing the demurrer, that Mr. *Briflow* came to the knowledge of the facts before he was concerned in the cause, and therefore ordered him to pay 5*l.* costs, and if he neglected so doing, the court would then consider the other part of the notice.

As to the case of *Hilderfey* and *Devifcher* in 1730, cited by Mr. *Samboorne*, where one of the defendants demurred as to his being examined as a witness, for that he was a party interested, and that upon the demurrer's being allowed, he was ordered his costs; it is so far in point, that the court went out of the com-

mon

mon rule of Lord *Clarendon's* orders, where demurrers are confined to parties in a cause.

VAILLIANT V.
DODDMEDE.

Sir Thomas Abney versus Miller, June 10, 1743 (1).

MR. *Littleton Burton*, clerk, sometime in the year 1732, made his will, and thereby gave and devised all his college leases which he then held of *Magdalen college* to Mrs. *Elizabeth Burton* his mother, to be sold by her immediately after his decease, and ordered and directed that the money arising by such sale should be distributed share and share alike to his said mother and the defendant *Edmund Burton* his brother, *Ann Miller* his sister, wife of *John Miller* of *Banbury*, exclusive of her husband, and after her decease to *Ann Miller* her daughter, and to *Mary Busfield*, now *Fletcher*, another of his sisters, and after several small bequests and legacies appointed his mother sole executrix and residuary legatee.

renewed after the devise of it, was a revocation of that devise, otherwise as to the lease not perfected for want of the college seal.

The testator, divers years after making the will, surrendered the college leases devised by it, and accepted two new leases of the said premises, one in *December 1736*, and the other in *August 1740*, and paid large sums of money by way of fine, but the last was not sealed with the college seal till after the death of the testator (2).

On the 27th of *Feb. 1740*, the testator died without having revoked, republished, or in any wise altered his will: *Elizabeth* the mother died after making the will, but before the testator, so that the bequest of the residue of the testator's personal estate became lapsed, and undisposed of, and subject to the statute of distributions.

The plaintiff has brought his bill in the right of his wife, who is one of the testator's five sisters, and insists upon her share in the residue under the statute of distributions, which depends principally upon this question, whether the renewal of the leases by the testator after making his will is a revocation of the will.

Mr. Attorney General, counsel for the plaintiff, cited the case of *Marwood versus Turner*, 1 April 1732, before Lord Chancellor *King* (3).

He insisted, that if it had been in the case of a freehold, there could not have been any doubt, and therefore it is incumbent on the gentlemen of the other side, to shew that there is any substantial difference between a revocation of a will of leasehold and of freehold.

(1) *Reg. Lib. A. 1743. fol. 641.*

(2) This last circumstance does not clearly appear by the register's book. The defendants alleged, that they could

only find one renewed lease. The devise as to one lease, however, was decreed to be revoked: but *secus* as to the other.

(3) 3 *P. W.* 153. S. C.

Cafe 335.
S. C. Amb. 29.
cited.
S. C. 2 Vef. 418.
B. after making his will, surrenders the college leases he had devised by the will, and accepts two new leases, and pays a large fine, the last was not sealed with the college seal till after the death of the testator.
Lord Hardwicke decreed that the lease actually

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Ward
2. Russell. 231

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MILLER.

Mr. *Chute* of the same side argued, that it is not the identical thing the term devised, but a different interest from what was in being at the time the will was perfected, and therefore as to one of the leases, at least, a clear revocation of that specific thing: he cited *Bunter versus Cooke*, 1 *Salk.* 237. and *Mason versus Day*, *Proc. in Chanc.* 319.

Mr. *Noel* of the same side insisted, that a renewal is in the nature of a purchase, and that the fine having been paid for both leases, though the college seal was not put to one, it is a revocation notwithstanding, for that a revocation need not be quite perfect, but where an inclination to revoke appears from circumstances, as a feoffment without livery, a bargain and sale without enrolment, it will be construed a revocation tho' the acts are not complete (1), and as the money, the material thing, was paid, the putting the seal of the college is rather a matter of ceremony; he cited the case of *Alford versus Earl* for this purpose, 2 *Vern.* 209.

Mr. Solicitor General, counsel for the defendants, insisted that the executrix was certainly intitled to the new leases under a bequest of the residue, and that notwithstanding she died before the testator, yet in equity, so far as she was barely a trustee, the right of the *cestui que trusts* is not at all hurt, but is equally the same as if the trustee was living.

The testator, in this instance of renewal, has done no more than what he had done several times before, for he always renewed with the college at the end of seven years, because if he had not, a severe fine would have been put upon him.

That common cases of leasehold estates are extremely different from bishops and college leases; nor have they cited one case to shew that barely renewing a college lease has been held to be a revocation, but only where it has been a common leasehold estate- *Vide* Lord *Lincoln's* case (2), and *Swinburne*, part 7. sec. 20. says, ademption of legacies is twofold, express and secret, express when the testator doth by words take away the legacy before given; secret, when the testator doth by deeds without words take away the legacy, as when he doth give away the thing bequeathed, or doth voluntarily alienate the same before his death.

Now in the present case there is no express ademption, because the testator has never said, the defendants should not have their legacy; neither is there an implied ademption, for here is no translation (as the civilians call it) or bestowing of the legacy bequeathed upon some other person, and therefore there is no implication in this respect.

Then from whence can the implication arise? why it must necessarily arise from the renewal only: and it must be submitted whether this will amount to an implied revocation.

Now in all these kind of estates the tenants by custom have a sort of tenant-right of renewal: a 14 years lease is always

(1) *Sparrow v. Hardcastle*, post. 3 vol. 803.

(2) 1 *Eq. Ab.* 411. S. C. *Strode*, P. C. 154, S. C.

kept on foot, and sometimes the tenants renew within seven years, and sometimes after: therefore this is not properly a new lease, but only a continuation of it, for it is never suffered to run out intirely.

As this is the nature of these interests, and it is well known there is a great deal of property of this kind in the kingdom, and the testator has done no more than what is usual, there is no pretence to say that his increasing the value of the thing given is revoking the legacy, but it is more natural to suppose it was done for the benefit of the devisees.

Swinbourne, part 7. 1 edit. 278. sec. 7. says, if the testator do bequeath a ship, and afterwards doth by piece-meal repair and renew the same, so that there remaineth nothing of the old ship but only the bottom tree: here is no ademption of the legacy.

To apply this to the present case, will any body say that in this court there is no part of the old bequest remaining; so that all which is substantially done is only an increase of the thing devised, and a continuation of the old interest; the statute of 4 Geo. 2. considers college leases in this light with regard to the tenant right of renewal.

He cited *Arne versus Smith*, 2 Vern 681, and *Brunsdale versus Winter*, before Mr. *Vernes*, where the question was upon two navy bills devised by the testator, which were afterwards paid off, and yet held to be no ademption. *Vide Ford versus Fleming*, *Abridgment of Cas. in Eq.* 302. and *Ellist versus Davenport*, 2 Vern. 472.

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The general doctrine to be gathered from these cases is that unless the testator's intention appears to revoke, the court will not presume an ademption.

In *Partridge versus Partridge, Cas. in Eq. in the time of Lord Talbot*, 226. A. devises 1000*l.* South-sea stock to B. at the making of his will he had 1800*l.* and by sale reduced it to 200*l.* which he after increased to 1600*l.* and died; between the making his will and his death, the act took place, which changed three-fourths of the stock into annuities, and held that the legacy was not taken away or impaired by the sale, nor by the act.

Swinbourne, old edit. 7th part 278, sect. 6. If the testator do bequeath all the corn in his barn, and, after the making of his will, the testator surviveth until all the corn be spent, and other corn be put in the place thereof, this spending of the corn is no ademption of the legacy.

Why may not this renewal be as well meant for the benefit of the devisee, and a continuation of the interest for his advantage?

Mr. *Browne*, counsel of the same side, compared it to a testator's giving a bond debt, and afterwards changes it into a mortgage, and so alters the nature of the security; yet, this is only new-modifying it, and is not an ademption of the legacy.

That though, in point of law, the surrender makes it a new independent and original lease, yet, in equity, it is considered only

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only as an ingrafting upon the old, and to be regarded as one consolidated interest.

LORD CHANCELLOR,

There are two questions in this cause.

First, Whether a college lease, actually renewed, after a devise of it in a will, is a revocation of that devise?

Secondly, Whether an attempt in the testator only to renew, is a revocation?

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As to the *first*, I am of opinion for the plaintiff.

And as to the *second*, for the defendants.

I will consider it, in the first place, as if it had been an express legacy, or gift of the term, to the three *cestuy que trusts*: For, suppose he had said, I give and bequeath both the leases to my mother, &c. equally, share and share alike; and afterwards the testator renews the leases;

What would have been the effect in point of law? There is no doubt but, in this case, it would have been an ademption, or revocation; and even if the executrix had assented, the legatees could never have recovered the term upon the renewal by an ejectment, for the thing itself is annihilated and gone.

It is not in this case a devise of the land, but a devise of the lease, which I hold (1), &c. of *Magdalen college*, &c.

Where a testator expresses himself in the present tense, it relates to what is in being at the time of making the will.

Just as if he had said, I devise the term, and that term is surrendered and gone: Where a testator expresses himself in the present tense (2), it must relate to what is in being at the time of making the will, and can mean only the first lease, and the term to come in it.

The defendant's counsel have compared it to a gift of a ship, or a house which is re-built after the making of the will; but they are different, for this reason, because a ship, or house, is the same corpus: And, in the present case, it is an absolute new term, and the old one is gone.

But then some stress has been laid on its being the common course and method of renewal in bishops and college leases.

This court does regard the custom of renewal in some cases, because if such an estate is given upon trust, and the estate so given is renewed after the death of the donor, yet the court considers it as governed by the old trusts (3), with respect to persons claiming under the testator; and the executor renewing would have been bound by the trust: But this will not extend so far as to bind the testator himself in his life-time, under any trust that he may have created.

If a testator who has devised an estate for lives, surrenders it afterwards, and takes a new lease it is a revocation.

The same as to freeholds; for if there is an estate for three lives in the testator, and he has devised it, yet if he surrenders these three lives, and takes a new lease, this is admitted on all hands to be a revocation (4).

(1) *Vide post.* 3 vol. 176.

(2) *Vide ante* 586.

(3) *Pierjon v. Shore*, ante 1 vol. 480.

note 1. *Carte v. Carte*, *post.* 3 vol. 176.
note.

(4) *Marwood v. Turner*, 3 P. W. 170.

Therefore

Therefore, I am of opinion, if it had been an exprefs bequest, it would have been a revocation in law (1).

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MILLER.

At the same time I agree, if a man had devised a lease, together with a right of renewal, and had done nothing in it himself, that then the expiration of the old term would not have barred the legatee, because the devise carried the right of renewal, as well as the lease itself.

A devise of a lease, and of the right of renewal, carries both the lease and the right.

Consider the case as it is penned under the will, that it should be distributed, share and share alike, to his mother and defendant, &c.

It is said, that the executrix would have had the legal interest, if she had been living.

This makes no difference, because, one way or the other, it would still have been a bequest of the term to the legatees.

In all cases of devises of personal estate, the whole vests in the executor; and therefore no legacy can come out of the executor without his consent (2); and, according to the definition of the civil law, it is a command or direction to the executor what he shall do with such and such parts of his estate.

The personal estate vests in the executor, and no legacy comes out of him without his consent.

But, whether it vests in the executor, or is directory, if the thing is annihilated, it makes no difference.

As I am clear of opinion, this would have been an ademption in law, so must it be here; for the rule as to revocations is the same in equity (3).

The rule of revocation of wills is the same in equity as at law.

It is said, that courts of law, or equity, will not allow of revocations, unless there is *animus revocandi* (4).

This would be laying down the rule of revocation much too narrow; and contrary to the known case of a feoffment to the same uses, with those in a precedent will, and yet held to be a revocation (5). *Id. in Lord Lincoln's Case, Eq. Caf. Abr.* 411.

Though a feoffment be to the same uses with those in a precedent will, yet it is a revocation.

The present case is much stronger, because here is an utter annihilation of the old term, and a purchase of a new one.

The argument of the act of parliament turns the other way, because the lessees had no remedy before to compel a renewal, and wanted the aid of the legislature.

Another argument has been raised from the inconvenience of these estates going contrary to the intention of the testator; and it certainly would be an inconvenience, if, upon every renewal, I must make a new will.

[599]

But persons who are acquainted with the proper method of conveying these estates by will, give in this manner, *all my estate,*

Where a testator says, I give all my estate, right

and interest I shall have to come in a college lease at the time of my death, though renewed after the will, it passes notwithstanding.

(1) *Rudstone v. Anderson*, 2 Vesf. 418. *How v. Medcraft*, 1 Bro. Cha. Rep. 261. *Cappyn v. Fernyboough*, 2 Bro. Cha. Rep. 291. *Attorney General v. Downing, Amb.* 571.

411. *Show. P. C.* 154. *S. C.* 4 Burr. 1950. *post.* 3 vol. 803. *Sed vide Doug.* 722. *S. C.* cited. *Cotter v. Laver*, 2 P. W. 624. *Rider v. Wager*, *ibid.* 332.

(4) *Vide Cowp.* 52. 4 Burr. 2515.

(5) *Brudenell v. Boughton*, ante 273.

(2) *Northey v. Northey*, ante 77.

(3) *Earl of Lincoln's case*, 1 Eq. Ab.

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MILLER.

right and interest, I shall have to come in this lease at the time of my death (1), or by a general devise of the residue (2).

A devise of corn in a barn, is not a specific legacy of particular corn, but a legacy of quantity, and must be made up by the executor (3). *Id.* as to the case cited of the devise of *South-sea* stock (4).

These persons are not to be considered in the same light with the executor, for they do not claim under her; but on a supposition that the thing is not at all given, they claim under the statute of distributions, as an heir at law claims in real estate: And if I was of opinion there is no revocation, a much greater inconvenience would arise, as it would overturn, and shake the established rules of law.

As to the point of re-publication, it was very faintly insisted on by the defendant's counsel.

For the fact was no more than this, the testator was looking for another paper after renewing his leases; and the person who was assisting him, having taken up the testator's will by mistake, he said, *that is my will*; not meaning to republish, but only to shew it was not the paper he wanted.

A republication of the will would not have altered the case, because the very thing it self was intirely annihilated.

To make it a republication, there must be *animus republicandi* in the testator; but even if there had been a republication, I am of opinion, it would not have altered the case; because the very thing itself was intirely annihilated and gone (5).

His Lordship decreed for the plaintiff, as to the lease renewed, and perfected by the college seal.

And for the defendants as to the other lease.

(1) *Vide post.* 3 vol. 176.

(2) *Sterling v. Lydiard, post.* 3 vol.

199.

(3) *Jeffrys v. Jeffrys, post.* 3 vol. 121.

(4) *Vide Purse v. Snaplin, ante* 1 vol.

414. note 1. *Stirling v. Lydiard, post.*

3 vol. 200.

(5) *Sed vide Coppin v. Fernyburgh, 1*

Bro. Chm. Rep. 291.

Case 336. *Taylor versus Jones, June 13, 1743, stood for Judgment at the Rolls.*
[600]

A husband who had 1733*l.* stock devised to him after marriage, vests it in trustees, for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children. *The settlement is void both as to creditors before and after the marriage; and the trust estate was decreed to be sold, and applied to the payment of the husband's debts.*

THE bill was brought by simple contract creditors of the defendant: The intent of the bill was, that the plaintiffs may be paid their debts out of 1733*l.* stock, vested in trustees for the benefit of the defendant for life, of his wife for life, and afterwards for the benefit of his children: The money so invested in trustees, was a legacy left to the husband after marriage (1).

(1) The settlement was made in 1734: and in 1741 the defendant gave warrants of attorney, to confess judgments against him; the creditors gave

him a letter of licence: but it was agreed, that that should not prevent them from proceeding against his effects, tho' it should protect his person.

Major

Master of the Rolls: This is a case between creditors on the one side, and a wife and children on the other, and therefore I directed the cause to stand over, not from any particular difficulty in the case, but because a wife and children were concerned.

I am of opinion it is a fraudulent settlement with regard to creditors.

The *first* question is, Whether this settlement, made in trust for the wife and children, is fraudulent in general, as it stands single and independant of the plaintiffs the creditors?

It has been insisted on for the wife and children, that this settlement is for a good consideration; nay, looked upon very often as a valuable consideration, since they are, in some respects, esteemed as creditors with regard to the father.

There is no doubt, in this respect, but it is a valuable consideration as against a father even after marriage, and even against a voluntary conveyance (1).

But I look upon it to be a standing rule as to creditors for a valuable consideration, that it is always looked upon as fraudulent, and within 13 *Eliz. c. 5.* against fraudulent deeds, alienations, &c.

The next question is, Whether this deed is within the proviso, or saving of the statute?

Now there is no doubt, though this is upon a good consideration with regard to the person making it, yet otherwise as to creditors. *Vide Twyne's case*, 3 *Co.* 84. The chief reason there was, that the person by whom the conveyance was made, continued in possession: It was resolved likewise, in *Upton versus Bassett*, cited in *Twyne's case*, that no purchaser can avoid a precedent conveyance made by fraud or covin; but he who is a purchaser for money, or other valuable consideration; for though in the preamble to this statute of 27 *Eliz. c. 4.* it is said for money or other good consideration, and likewise in the body of the act, yet those words, good consideration, are to be understood only of valuable consideration; and this appears by the clause of lands first conveyed with condition of revocation, for there it is said for money or other good consideration paid, or given; the word *paid* is to be referred to money, and *given* is to be referred to good consideration; so the sense is for money paid, or other good consideration given, which words exclude all considerations of nature, or blood, or such like, and are to be intended only of valuable consideration, which may be given; and therefore he who purchases land for valuable consideration, is a purchaser only within the statute.

Now, in the present case, here is a trust left to the husband in the first place, under this deed; and his continuing in possession is fraudulent, as to the creditors, the plaintiffs.

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JONES.
Townsend.
Michael.
2. Beaver.
11/10.

Such a settlement good as against a father after marriage, and against a voluntary conveyance.

Moreau.
Dodd.
1. Craig.
100.

Blenkinsop.
Blenkinsop.
12 Beaver.
56.

[601]

(1) *Goodwin v. Goodwin*, 1 *Ch. Rep.* *ibid.* 365. *Clawering v. Clawering*, 2 173. 1 *Eq. Ab.* 23. *S. C.* *Villiers v. Fern.* 473 *Hobson v. Staneer*, 9 *Mot.* 80. *Beaumont*, 1 *Fern.* 100. *Allen v. Arme*, *Dog dem. Watson v. Routledge*, *Comp.* 705.

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JONES.

The next consideration is, Whether the debts contracted after the settlement made, are included in this statute of 13 *Eliz.* (1).

The preamble is for the avoiding and abolishing of feigned, covenous, &c. fraudulent feoffments, gifts, bonds, suits, &c. which feoffments, &c. are devised and contrived of malice, &c. to the end to delay or defraud creditors and *others* of their just and lawful debts, &c. Be it enacted, &c.

The word *others* seems to be inserted to take in all manner of persons, as well creditors after, as before the settlement, whose debts should be defrauded.

In the enacting clause still stronger, because the word creditors are not mentioned, but general words person or persons, "That all and every feoffment, &c. at any time had or made, or hereafter to be had or made, to or for any intent or purpose herein before declared, shall be from henceforth deemed, &c. (as against that *person or persons*, his or their heirs, executors, &c. whose debts, &c. by such fraudulent practices as is afore-said, are, shall, or might be, in any wise, or in any way disturbed or defrauded, &c.) to be clearly and utterly void."

The words of the statute, therefore, seem to be so general, in order to take in all persons who shall be any ways hindered or delayed, &c.

[602] This being the intention, I think it is highly reasonable it should be so construed, and no rule of law that hinders creditors after marriage, any more than creditors before, from being paid.

And it is very probable that the creditors, after the settlement, trusted *Edward Jones*, the debtor, upon a supposition that he was the owner of this stock, upon seeing him in possession.

Three cases have been cited to make this a fraud: *First*, *Osbourn and Bradshaw* versus *Churchman*, *Cro. Jac.* 127, but it does not come up to the present case, for the question there, was not whether the deed was fraudulent, but whether the interest in the lands passed.

Secondly, *Lavender* versus *Blackstone*, which comes nearer the present, *vide* 2 *Levinz* 146, where *Hale* was of opinion, that every conveyance should be esteemed *prima facie* fraudulent against a purchaser; but circumstances may alter the case.

Whitbourne versus *Fumper*, before Sir *Joseph Jekyll*, is still nearer, and though it is not quite the present case, yet it resembles it very much, with regard to the agreement between the plaintiffs and defendant, *viz.* That if they would allow him two years to pay their debts, he would give a warrant of attorney to confess a judgment.

The great question is, if this deed be fraudulent? For, if it is, Whether the creditors have any specific lien is not material; for as soon as the judgment was entered it would have been a specific lien.

These are the cases which confirm me in my opinion.

(1) See *Ruffell v. Hammond*, *ante* 1 vol. 15. and the cases cited in note

For the defendant was cited the case of *Littleton versus Marlow*, before Lord *Hardwicke*; but there it was the wife's fortune that was settled, which varies the case; for here it was not the wife's fortune that was settled, but what the husband was intitled to in his own right.

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The case of *Scileman versus Asbdown*, December 8, 1742 (1), which was cited, though a settlement after marriage was in consideration of the wife's portion, and therefore different.

It is not material, in the present case, what the circumstances of the father were at the time of making this deed, any further than as an evidence, to shew, if he was in indigent circumstances, that it was made with an intent to commit a fraud.

But the material consideration is, Whether it is within the proviso of 13 *Eliz.* for if it is not, the court will not require a strict proof of its being fraudulent; and as it is likewise accompanied with a trust, the court will look upon it to be so, and there is no occasion to prove it; for it lies on the part of the defendant to prove what his circumstances were at the time of making the deed, as he may be supposed to know it much better than the plaintiffs.

[603]

It is upon these reasons I must decree for the plaintiffs, the creditors against the wife and children; for though I have always a great compassion for wife and children; yet, on the other side, it is possible, if creditors should not have their debts, their wives and children may be reduced to want.

He decreed the deed of settlement to be void, as against the plaintiffs, and the trust-estate to be sold, and applied to the payment of the creditors (2).

(1) *Ante* 477. S. C. *post*. 608. S. C.

(2) *Reg. Lib. B.* 1742. fol. 483. In *Dundas v. Dutens*, *Vif.* jun. 196. Lord *Thurlow* seemed to be of an opinion, that the court of chancery could not touch stock to satisfy creditors. *Sed vide Horn v. Horn*, *Amb.* 79. *King v. Dupine*, October 1744. Mr. *Dupine* was entitled to the reversion of four *exchequer annuities* after the deaths of Mrs. *Dufour*, and Margaret the wife of Peter Henry; which annuities were vested in trustees by a decree of the court of chancery upon the above trusts: so that *Dupine* was in fact but a *cestuique trust* in reversion. The plaintiff having obtained a judgment against *Dupine*, filed her bill against him, the trustees, and others (see *post*. 3 vol. 192. S. C.); after the coming in of the answers of the trustees, she filed her supplemental bill, stating, that a *fiery facias* had issued upon her judgment, and that the sheriff had by virtue thereof seized the reversion of these four *exchequer annuities*, and had made an assignment thereof

to one *Warden*, in trust for herself: that she, wishing to have the assignment registered, had applied to the proper officer for that purpose, but he refused to register or record the said judgment and assignment, because neither the plaintiff nor her trustee was in possession of the orders, which had been made out, or the tallies which had been struck for the payment of the said annuities. Plaintiff, therefore, prayed by her supplemental bill to have the reversion of these annuities sold, and out of the monies to arise by such sale to have her judgment debt satisfied. The defendants the trustees by their answer submit whether the sheriff could seize the reversion of the annuities, and make such assignment thereof as aforesaid, and whether the same ought to be sold; and the defendants *Dufour* and *Henry* admit, that they had the orders for the said annuities in their possession. Lord *Hardwicke* decreed, that the plaintiff's bills should be taken *pro confesso* as against *Dupine*, and as between the plaintiff

riff and the other defendants, his Lordship decreed (among other things) that the trustees and *Warden* should assign all their reversionary estate or interest in the *said four long annuities to the plaintiff*. That *Dufour* and *Henry* should produce upon oath before the Master the orders, whereupon the said annuities were payable; and in case any entries were necessary to be made at the exchequer in order to entitle the plaintiff to the benefit of such reversion, then the Master

should appoint a proper person to attend there with the orders, to the intent that such entries should be made; and after such assignment and entries made, that the orders should be re-delivered to *Dufour* and *Henry*, subject to the order of the court; and after their deaths, the plaintiff, or such person as should be interested therein, should be at liberty to apply to the court, to have such orders delivered to her or them. *Reg. Lib. A. 1744. fol. 91.*

Cafe 337. *Sir Casar Child* versus *Gibson*, June 15, 1743. *A Plea of a former Decree.*

LORD CHANCELLOR,

To support a plea of a former decree, you must set forth so much of the first bill and answer, as will shew the same point was then in issue.

THE question in this case is, Whether this is such an exception, as to be a bar to this new bill.

Windsor v. Garcia
12 Cook & Fergus
368 Every plea that is set up as a bar must be *ad idem*. Therefore, if a judgment or decree is pleaded, it must appear to be *ad idem*.

Garcia v. Ricardo
14 Simonds 368 Now the defendant should have set forth so much of the former bill and answer, as to have shewed the same point was then in issue; he has not done this, but only pleads that a bill was brought for an account, and a decree made.

For it is extremely hard to say, that because the plaintiff failed in the case which he made on the former account, that now he has made a new case, and brought a new bill, that he shall not be allowed to go on, but be barred by a plea of a former decree in the same matter.

The court will not charge interest upon an executor, who makes use of assets come to his hands, in the way of his trade.

I will not say, but if an executor had placed out assets that were specifically devised, but the court would oblige him to account for the interest he may have made of those assets; but there never was a case in this court where a Master was directed to charge interest upon an executor, who makes use of assets come to his hands in the way of his trade (1).

[604]

The bill would be sure have been more formally brought, if it had charged the decree made in the former cause, and not have said only, as it does now, that it is for an account.

But this is merely a matter of form, and it would be very hard to allow this plea, for a defect in form in the bill, and turn the plaintiff quite round by dismissing this bill, and obliging him to bring a new one; therefore, I think, the justice of the case will be, to let the plea stand to so much of the bill as seeks a general account of the personal estate, and as to all matters in the bill

(1) *Vide Adams v. Gale*, ante 106. note 2. *Hicks v. Hicks* post. 3 vol. 274.

relative to demands of interest, let the plea stand for an answer, with liberty for the plaintiff to except.

CHILD v.
GIBSON.

Anonymous, June 16, 1743.

Case 338.

LORD CHANCELLOR laid down these rules :

Where a motion is made to dismiss a bill for want of prosecution, if it is not an affected delay, but arises merely from the circumstances of the case ; as for instance, from the number of defendants, and some of them being abroad, so that it requires time to get in all their answers ; *there* upon producing the order obtained for a *subpœna* to rejoin upon the defendant, and affidavit of the number and distance of the parties, and of some of them being out of the kingdom, the court will not grant the motion.

If for want of producing the order (for suggestion of counsel is not sufficient) and affidavit, the bill is dismissed ; yet upon the plaintiff's moving afterwards to retain the bill, upon payment of costs out of purse to the defendant, and producing such order and affidavit, the court will retain the bill notwithstanding.

If the plaintiff produces the order for a *subpœna* to rejoin, and an affidavit of some of the parties being out of the kingdom, the court will not dismiss his bill for want of prosecution.

Though a bill has been dismissed for want of such order and affidavit, yet upon producing them afterwards, and payment of

costs out of purse, the court will retain it.

Upon moving to retain a bill upon payment of costs out of purse, the court will not grant it, when on a former motion the bill was dismissed for want of prosecution, and defended by counsel, unless the plaintiff can shew that the order for the *subpœna* to rejoin was dated before the notice to dismiss the bill.

On motion to retain the bill, the plaintiff must shew that the order for the *subpœna* to rejoin was dated before the notice to dismiss.

Hills versus Wirley, July 6, 1743.

Case 339.

[605]

THE words of the will on which the principal question depended were as follow :

" If it shall happen that my personal estate which shall not be otherwise by this my will disposed of, shall fall short to pay my debts, legacies, and funeral expences, *then I do order and direct that my copyhold lands, gardens and premises, which I bought of Dorothy Combe, shall stand charged with such deficiency*, and the sum and sums of money so falling short as aforesaid, shall be paid out of the said copyhold estate ; then she gives several specific legacies, and then follows this devise : *I give unto the right honourable Henry Earl of Rochford all and singular the household goods in the schedule hereunto annexed, and by me signed, he paying forty pounds per annum to such person and in such manner as herein aftermentioned, and giving security to my executor for payment thereof.*" Then she gives twenty pounds *per annum* to one person for life, ten pounds to another for life, and five pounds to the plaintiff for life, to be paid her half yearly ; the first payment to begin and to be made six months after her decease.

As long as the fund itself exists upon which a legacy is charged, though it devolves either upon the heir or executor, yet they take it subject to the charge.

*See the
Pittman
De. v. v.*

HILLS v.
WIRLEY.

Then all *the* remainder of her estate she gives to *Knightly Birch*, Esq; and appoints *Wirley*, her executor.

The testatrix left more than sufficient to answer her annuities (1).

The question is, Whether under the circumstances of this case, the personal estate being sufficient, the annuity of five pounds *per annum*, &c. ought to be paid to the plaintiff and the other persons.

LORD CHANCELLOR,

One thing is very plain, that the testator intended her legacies should have the annuities, and therefore if there is any room to assist them, the court will do it notwithstanding the accident has happened of the testatrix's annexing *no schedule* of the household goods.

The question is, Whether this annuity of five pounds and the rest of the annuities are not gone, the fund failing upon which they were charged.

Now it does not appear to me that there is that absolute uncertainty, or no fund upon which this legacy can attach.

[606] *Vide* the words of the devise to Lord *Rochford*. It has been truly said that the five pounds a year, part of the forty pounds *per annum*, is given out of the household goods; and it was admitted by the counsel for the executor, it is not necessary that the devise to Lord *Rochford* should take effect to make the annuity legacies effectual, for if he had died, the executor should notwithstanding have been trustee for the forty pounds *per annum*.

It is admitted further, that if the fund had been ascertained by the schedule, and Lord *Rochford* had refused to give security, then the goods would have been directed to be sold for payment of the legacies.

The fund itself being applicable, it is just the same as if the testator had given a particular piece of plate, or a bond to Lord *Rochford*, and he had died, for then these things must have been sold to answer the legacies.

It was insisted on, here is a difference in the present case; for that if it had become void in the life-time of Lord *Rochford*, still it might have been well enough; but here it is void in the original creation for the uncertainty, and this is the strength of the defendant's case.

I do admit, if this has been void in its original creation, and that it had not been *in rerum natura*, and nothing consequently had gone to the executor which had been charged with the annuities, they would have been void: but here the fund out of which the annuity is to be charged is most undoubtedly gone to the executor, *viz.* her household goods, for they cannot in any propriety of speech be taken to be any other person's than the testatrix's; and she not having annexed any schedule to her will, those household goods are of course gone to her executor.

But, said Mr. Attorney General, supposing the household goods had been deficient, and Lord *Rochford* had refused them, why

(1) But she left no schedule annexed to her will, and signed by her.

then the annuities must have fallen equally short, and I allow that to be right.

HILLS v.
WIRLEY.

But the case cited by Mr. Solicitor General out of *Swinbourne*, 7th part, 254, is a full answer, "If a testator do bequeath lead, money, or wheat, not expressing the quantity, the bequest is unprofitable, because of the great uncertainty, at least it seemeth the executor is delivered, by delivering a very little; howbeit if the legacy consisting in weight, number or measure, be disposed for the performance of some act, or other certain consideration, as for the building of *some bridge*, or *amending of highways*, or for the education or alimentation of *some person*, or maintaining him at study, or for the relief of the poor, or for the repairing of the church, or for other like uses: in these cases the legacy is not void, albeit no quantity be expressed: for so much is understood to be disposed of as may satisfy, or answer that purpose wherunto it is appointed."

[607]

If the testator has described such household goods as are sufficient, and the executor does not controvert that there are such household goods; can any thing be stronger, than that the testator intended they should be applied, at all events, towards satisfying the annuities as far as they will go?

The words *hereunto annexed* must be construed as if she had said, which I intend to annex to my will, for she could not *eo instante* devise the household goods, and direct a schedule to be taken, but the legacy must precede, and is the same thing as if she had given them at once by way of testamentary schedule.

The other point deserves to be considered; whether (if there should be a deficiency of *the household goods*, to satisfy the annuities) the executor must not make it good out of the personal estate?

See the first part of the will, which directs the copyhold lands, &c. to stand charged with such deficiency.

It is plain that there are some legacies the testator intended her copyhold estate, &c. should make good, if the personal fell short.

All the legacies except a month's wages to her servants, and these annuities are, specific legacies.

When the testatrix mentions legacies in general, she means that all legacies, which could not find a sufficient fund out of the personal estate to be satisfied, should be thrown upon the copyhold estate, &c.

As to the devise to the servants, as the testatrix had given a month's wages, or a month's warning, nothing might have become due by way of legacy, for the servants might have been turned away, and then the month's warning would have been a debt, and not a legacy, and therefore she could have nothing material in her contemplation, or any other legacy, besides the annuities which she could intend to charge in this manner on her copyhold estate.

The essential rule in all these cases, is, that as long as *the fund* itself exists upon which the legacy is charged, though it de-

HILLS v.
WIRLEY.

volves either upon the heir or executor, yet they take it subject to the charge (1).

His Lordship decreed the household goods in the hands of the executor, to be applied towards satisfying the annuities, and if those were not sufficient, the residue of the personal estate to be applied for that purpose (2); and if there should be still a deficiency, to be made good out of the copyhold lands, &c.

(1) *Wigg v. Wigg*, ante 1 vol. 382.
Oke v. Heath, 1 Ves. 135. 141.

(2) *Reg. Lib. A.* 1742. fol. 681.
There were no directions given as to the copyhold estates.

Case 340.
[608]

Stileman versus Asbdown, June 18, 1743. A Rehearing.

S. C. Amb. 13.
ante 477.
Lord Hardwicke,
being of the
same opinion he
was at the former
hearing, affirmed
the decree he made
on the 8th Dec. 1742.

THE single point here was, whether a judgment creditor shall have the whole real assets (descended upon the heir of the conusor) sold to satisfy his debt, or only a moiety, being obliged to come into this court to set aside a fraudulent conveyance.

This cause was heard the 8th of *December* 1742, and the Chancellor was then of opinion that only a moiety of the real assets should be sold.

Mr. Attorney General was counsel for the heir at law and executor.

The statute of *Westminster*, he said, which gives the *elegit*, means no more than to give the judgment creditor an election to come upon the lands of conusor for one moiety of his debt, and as to the other moiety, upon the personal estate of the conusor.

The present defendant is bound no otherwise than as *tenant*.

Suppose this was the case of a mortgagee, would the court do it to his prejudice? If the court would not do it in that case, why will they do it against an heir at law?

The cases cited on the other side do not come up to the present purpose, the first case was *Compton versus Pigot*, before Lord *Harcourt* the 14th of *December* 1711.

There a bill was brought by a judgment creditor against an executor and the heir at law, to have the personal estate applied first, and if not sufficient, then the real estate to be sold.

The words of the decree there to have the whole real assets sold *liable* to the judgment, may admit of this doubt, whether the decree does not confine it to such assets as are only *liable* to the judgment, and not to all assets descended upon the heir.

He cited two cases as in point for the defendant in Lord Chancellor *King's* time, *Harvey versus Woodhouse*, *October* 30, 1730 (1), and *Fyß versus Burdiss*, the *February* following.

(1) *Finn. Gibb.* 144. *Sel. Ca. Cha.* 80. S. C.

Lord

LORD CHANCELLOR,

Had it not been for the case of *Compton* versus *Pigot*, I should have thought it very clear for the heir at law.

STILEMAN v.
ASHDOWN.

The judgment affects the land as it is bound by the judgment: equity follows the law in this case, and as the plaintiff can extend only a moiety there, he shall have no more here.

[609]

It appears to me in this light; suppose it was in the case of a bond creditor, he might have an action of debt against the heir, and judgment against him upon assets descended; and this he is intitled to at common law, for it is the debt of the heir (1), and the action is in the *debet & detinet* (2), but against the executor only in the *detinet*, and the heir can discharge himself no otherwise than by pleading *riens per descent*.

But if a judgment was obtained against the ancestor, a *scire facias* could not be brought against the heir, because at common law the heir was not bound; and there is no instance before the statute of *Westminster*, of a *scire facias* brought against the heir on such judgment obtained against the ancestor.

There is no doubt but if it had continued a bond, the whole assets would have been liable in the hands of the heir (3): but before the statute of *Westminster* there was no remedy against the ancestor in his life-time upon a judgment, *on his land*: and it is that statute subjects one moiety thereof to the judgment creditor.

The consequence of this is, that notwithstanding the ancestor is dead, if the land comes into the hands of the heir or purchaser, it comes equally bound.

In what right then is the *scire facias* brought against the heir or purchaser? Why only as *terre-tenants*, and by virtue of the statute (4).

I thought of the objection myself, that a bond creditor would be in a better condition than a judgment creditor, and so he is.

For as soon as the bond debt is turned into a judgment it is extinct against the ancestor, and the creditor cannot in the life-time of the ancestor bring any action upon the bond; can he then bring an action against the heir after it is entirely extinct? But still he obtains a great advantage by a judgment, as it gives him an opportunity of binding the land immediately, and likewise gives him a preference over all other bond creditors.

After a bond debt is turned into a judgment, the creditor cannot in the life-time of the ancestor bring any action upon the bond, nor against the heir, for it

is intirely extinct; but he still obtains a great advantage as the judgment binds the land, and gives him the preference to all bond creditors.

And therefore the creditor prefers this real advantage to a precarious one of assets descending upon the heir after the death of the ancestor.

(1) *Stancher v. Thompson*, ante 441.

(3) *Higgins v. York Buildings Com-*

(2) *Kingson v. Clerk*, ante 205. *Dyer*.

pany, ante 107.

344. b.

(4) *Vide Herbert's case*, 3 Co. 12. b. *Dyer* 81. a. pl. 62. *ibid.* 149. a. pl. 80.

STILMAN V.
ASHDOWN.

A court of equity will not oblige a judgment creditor to wait till he is paid out of the rents, but will accelerate the payment by directing a sale.

If this is the case at law, what is there in equity to better his case? Why, nothing more than to accelerate the payment, by directing a sale of the moiety, and not let the judgment creditor wait till he has been paid out of the rents and profits; but equity cannot change the right of the parties.

As to the case of *Piggot* versus *Compton*, perhaps it was not considered sufficiently; or, besides, a moiety in that case, when sold, might perhaps be enough to discharge the judgment.

The decree was affirmed; and the deposit ordered to be delivered to the defendant.

Case 341.

Sturt versus *Mellish*, July 13, 1743.

LORD CHANCELLOR,

The case being very much entangled, and the transactions of long standing, the court chose rather to dismiss the bill, and leave the plaintiff to his action at law, than direct an account before the Master.

THIS cause has taken up more time than the court could well spare, but I was willing to hear such an entangled affair, that I might not send it to a Master, if it could be avoided.

I do not see that more papers or more letters can be laid before a Master than are already before me.

The plaintiff's bill is not for a general account, but for a particular demand.

One of the two *conhezimentos* received by *Villa Real* was under a letter of attorney from Mr. *Sturt*.

The second is a demand of three other orders, or army debentures, or *folks*'s, as they are called in *Portugal*.

The matter for the consideration of the court is, whether there has been a satisfaction made by *Villa Real* in his life-time, or whether the long acquiescence of the plaintiff, and the statute of limitations, is a bar to his demand on the defendant, as representative of *Villa Real*.

The first question is, Whether the court ought to decree there has been a satisfaction of these two demands, or either of them?

Secondly, whether these demands are barred by the statute?

[611]

There was an account stated between the plaintiff and *Villa Real* on the 27th of September 1721, and a considerable debt was due from *Sturt* to *Villa Real*.

A letter of attorney was executed by the plaintiff to *Villa Real* the next day, constituting him his sufficient attorney to recover in 23 millions of *mill-rees*, 3000 dollars, and 3 *folks*.

I cannot presume, in such solemn transactions in writing, that the plaintiff would under his hand have acknowledged that he had a counter obligation from *Villa Real*, if he had not really such

such counter security, though it is not forth-coming now; but as Mr. *Sturt* swears that he has no such counter obligation, unless I could find out some way of clearing up this matter, it is a strong objection against sending it to an account.

STURT v.
MELLISH.

From the year 1722, to the year 1730, when *Villa Real* died, there is no evidence of the plaintiff's making any demand upon him for the two *conhezimentos*, though he made other demands of a very small amount, which is a very material circumstance in favour of *Villa Real*.

If the plaintiff has a mind to clear up this affair, why does he not produce *his copy book* of letters, which all merchants keep, and which have been allowed to be read in evidence in this court, where the person who has the original letters refuses to produce them.

A merchant's copy-book of letters has been allowed to be read, where a person who has the original letters refuses to produce them.

It is extremely material, that there is no demand of the *conhezimentos*, or any part thereof, during all this time; but the plaintiff even acquiesced under Mr. *Villa Real*'s refusing to answer so small a sum as 2000*l. mill-rees*, without any complaint, or expostulation upon it.

So it rested till both *Villa Real* and the plaintiff came into England. And now a demand is made, after the death of Mr. *Villa Real*, upon his executors, who are not so capable of clearing up this affair of the two *conhezimentos*, &c. as Mr. *Villa Real* would have been in his life-time.

From the evidence I have heard, if nothing more was before me, and the presumption from circumstances, I should have been of opinion, that the plaintiff would have been barred of the account he demands; for besides the length of time, which is a strong argument in favour of the defendant (1) the counter security or obligation is lost, the letters likewise are lost, and no copies of them have been produced by the plaintiff; then how is it possible to take an account; and therefore the plaintiff's own acquiescence from 1722, to 1736, is a presumptive satisfaction (2). *Sherman versus Sherman*, 2 *Vern.* 276. is a material case, with regard to length of time, and also to accounts current between merchants*.

[612]

Suppose there were not all the objections arising from the plaintiff's contradicting himself, and the course of the evidence, yet I should be of opinion, that the statute of limitations would be a bar to the plaintiff's demands.

The first question is, Whether this case is at all within the statute of 21 *Jac. c.* 16. and whether it ought not to be considered as a trust in equity, as the plaintiff's counsel insist?

I agree, if it is a trust, it would not be within the statute; but there is no colour to call it so here; for a trust is where there is such a confidence between parties, that no action at law

A trust is where there is such a confidence between parties that no action

will lie, but is a case merely for the consideration of equity.

(1) *Vide Standish v. Radley*, ante 178. (2) *Lacen v. Briggs*, post. 3 vol. 105.

* Though length of time is no bar betwixt merchant and merchant, yet if dealings betwixt them have lasted for several years, and one of them dies, and the surviving merchant brings a bill for an account, the court will not decree an account, but leave the plaintiff to his remedy at law. 2 *Vern.* 276. *Sherman versus Sherman*.

STURT V.
MELLISH.

will lie (1), but is merely a case for the consideration of this court; and every bailment might as well be said to be a trust as this.

The next question is, if it is not a trust, Whether it falls within the exception, as between merchant and merchant, their factors and servants? *Sec.* 3. of the statute, "And be it enacted, that all actions of trespass, &c. all actions of account, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced and sued within six years next after the cause of such actions or suits, and not after."

It has been said, that though Mr. *Villa Real* was not a merchant, yet the plaintiff plainly was.

Transactions with a foreign prince and his government, do not concern the trade of merchandise.

But does the transaction in the present case at all concern the trade of merchandise? I am of opinion it does not; for these are only transactions with the King of *Portugal*, and the government of *Portugal*; and are like transactions here with the victualling office, and other offices of the government.

It is not the dealing of a merchant with any other person, which will make that person a trader within the meaning of this statute.

A letter of attorney from one merchant to another, to get in debts, will not make the person so deputed a merchant within

* Suppose a merchant, who has debts owing him, gives another merchant a letter of attorney to get in those debts, such a transaction will not make such a person, so deputed, a merchant within the exception, no more than if he had given the letter of attorney to a person not a merchant.

the exception of 21 Jac. 1.

[*613]

Then the next question will be, Whether this case is not within 4 *Ann. c.* 16. for the amendment of the law.

I own, I was at first doubtful, but, upon consideration, am of opinion, that it is not within the clauses of that statute. *Vide Prec. in Chan. Locky v. Locky* 518.

When these contracts were made, the plaintiff was in *Portugal*; in 1729, returned into *England*, Mr. *Villa Real* being then in *England* likewise; and the plaintiff afterwards returned to *Portugal*.

Consider this then under the proviso of 21 Jac. 1. *sec.* 7. "Provided, and that if any person, that is or shall be intitled to any such action of accounts, &c. be, or shall be, at the time of any such cause of action given or accrued, within the age of 21 years, feme covert, non compos mentis, imprisoned or beyond the seas; that then such person shall be at liberty to bring the same actions, so as they take the same within such times as before limited after their coming to, or being of full age, discovery, of sane memory, at large, and returned from beyond the seas, as other persons, having no such impediment, should have done."

(1) But Lord *Hobart*, it seems, was of opinion, that an action would lie against a trustee at common law. 1 *Eq. B.* 384 (D) note (a).

The plaintiff in this case having been in *England* after both these demands had accrued, he ought to have brought his action within six years from that time.

STURT V.
MILLER.

Consider the statute of Q. Ann. *sess.* 19. Be it further enacted, "That if any person, against whom there shall be any
" cause of action of trespass, &c. or of action of account, &c.
" be, or shall be, at the time of any such cause of suit, or
" action given, &c. *beyond the seas*, that then such person, who
" is or shall be intitled to any such suit or action, shall be at li-
" berty to bring the said action against any such person *after their*
" *return from beyond the seas*, so as they take the same, *after their*
" *return from beyond the seas*, within such times as are respectively
" limited for the bringing of the said actions before by this act,
" and by the said other act made in 21 *Jac.* 1."

The creditor here has the same privilege given him by this last act, in respect to the debtor's being beyond sea when the cause of action accrues, as he had by the former act, in respect to his being beyond sea himself.

The creditor by 4 Ann. has the same privilege of the debtor's being beyond sea, as he had by

the statute of James, on his being beyond sea himself.

[*614]

I agree with the plaintiff's counsel, that these statutes must be so considered, as if the clauses in the last had stood originally in the statute of King James.

These statutes must be so considered as if the clauses in the last had stood originally in the last.

What is the saving here? Why, that if any person is beyond sea at the time of the cause of action, he shall be at liberty to bring the same action *when returned from beyond the seas*, so as, &c.

Therefore this must be a person absent at the time the action accrued, for if he was not beyond sea then, he is out of the saving of this statute.

The statute of 4 & 5 Ann. says, if a debtor be beyond sea at the time, &c. that such person, who shall be intitled to such suit, shall be at liberty to bring, &c. so as they take the same *after their return from beyond sea*, &c. within six years.

Within six years after what? Why, after the return of the debtor, which is the natural and only construction of the words, *after their return*.

The plaintiff's own privilege was gone, for he was returned into *England*; and taking it that this action accrued from the execution of the contract; why, then from his being returned into the kingdom the time will run, unless he takes the advantage of his debtor's being out of the kingdom; and the plaintiff's going abroad again, will give him no privilege whatsoever, for that was gone by his having once returned to the kingdom, after cause of action accrued.

Where a creditor who has been out of the kingdom returns, the time will run, and his going abroad again will give him no privilege, for that was gone by his having once returned after cause of action accrued.

Suppose a creditor, both of non-sane memory, and out of the kingdom, comes into the kingdom, and then goes out of the kingdom, his non-sane memory continuing; why, his privilege, as to being out, is gone; and his privilege, as to non-sane, will begin from the time he returns to his senses.

STURT V.
MELLISH.

So here the plaintiff had a double privilege: But by being in the kingdom after the cause of action had accrued, and not bringing any, though he went out of the kingdom again, his privilege is gone, as much as if he had been in the kingdom the whole six years; so likewise, the debtor having returned to the kingdom, and the plaintiff bringing no action against him within the six years, this privilege is likewise gone notwithstanding the plaintiff was out of the kingdom himself.

[615]

As this case is very much entangled, though the evidence is not quite positive, yet it is sufficient to justify me in dismissing the plaintiff's bill, rather than to direct an account, where, after a long litigation, it may come back again upon the very same points, as in all probability there will be no new light before the Master, and therefore I will dismiss it without costs: But if the plaintiff should have a mind to bring an action at law upon the promise pretended to be made by *Villa Real*, with regard to the three *falks*, I will direct that the time which has run during the pendency of this suit, shall not be taken advantage of at law (1).

(1) *Vide Lake v. Hayes*, ante 1 vol. 282. *Anon.* ante 1.

Case 342.

Hawes versus *Hand*, July 13, 1743.

The father of *H.* the plaintiff in the original cause, examined *H.* to the merits; after his father's death, he brought a bill of revivor, and became a party interested; this does not disqualify him from being an evidence.

AD M I R A L *Hosier*, in his absence, employed one *Bishop* to manage his affairs, and gave him a letter of attorney for that purpose; after *Hosier's* death, several suits were brought against *Bishop*, who employed *Hand* the attorney to defend him, who, by that means, became possessed of several papers and writings belonging to *Hosier*; the original bill was brought by *Hawes*, the father of the present plaintiff, who was administrator to *Hosier*, for these writings, and examined his son, who was a material witness to the merits of the cause, pending this suit; *Hawes* the father dies, and *Hawes the son*, by this means, becomes interested in *Hosier's* personal estate, by being left executor under the will of his father, and by having taken out administration *de bonis non* to *Hosier*, and brings on this cause now by bill of revivor.

An objection was taken by the defendant's counsel to reading his evidence, as he is now a party interested; and Lord Chancellor, at first, thought it a proper objection; because the plaintiff, by his own act of taking out administration *de bonis non* to *Hosier*, has disqualified himself from being an evidence; but upon the authority of *Goss v. Tracy*, 2 *Vern.* 699*, which is in point, as to admitting the evidence, notwithstanding his becoming interested, the Chancellor allowed the deposition of the plaintiff to be read.

* One examined as a witness, when disinterested, afterwards becomes intitled to the estate in question, his deposition shall be read. *Goss v. Tracy* (1).

(1) 1 *P. W.* 289. S. C. So *Glyn v. Lank v. Metcalfe*, post. 3 vol. 95. *Bank of England*, 2 *Ves.* 42. See *May*.

Fisher
Hosier
Phillips
235
Hawes 620

Chauncy and others versus Graydon and others, July 16, 1743. Case 343.

THE questions in this cause arose upon the following will.

"*Rene Badouin* by will dated the 22d of *June, 1727*, did constitute his nephew *Gabriel Tabourdin*, and three others, executors; and, among several bequests, gave 1500 *l. South-sea* stock to his executors, in trust to pay the yearly dividends and profits thereof to his brother *Claude Badouin*, during his natural life, and from and after his death, in trust to pay the said 1500 *l. South-sea* stock among the seven children of his nephew *Gabriel Tabourdin*, in the manner and proportion therein after directed and appointed concerning 7000 *l. South-sea* stock, by him herein after devised to and for the use and benefit of the said seven children of *Gabriel Tabourdin*; and did thereby also give to his said executors 7000 *l. South-sea* stock, in trust to transfer 1000 *l.* thereof to each of the seven children of his said nephew *Gabriel Tabourdin*; to wit, *Elizabeth, Gabriel, Mary, Rene, Dorothy, Peter, Cassandra*, at their respective ages of twenty one years, or days of marriage, they marrying with the consent of the said *Gabriel Tabourdin* the father, or his executors, or the survivors or survivor of them, to be testified by their subscribing their names to the marriage articles, or settlement of the said children, as witnesses, or by being parties thereto, and executing the same: And in case any of the said children should die before twenty-one, or should marry without consent as aforesaid, then, and in such case, his will was, that the share or shares in the said 7000 *l.* of such child or children as should die, or marry without consent as aforesaid, should go and be transferred, share and share alike, to the others of the said seven children, at twenty-one or marriage with consent as aforesaid; and did thereby direct, that his nephew *Gabriel Tabourdin* should receive and enjoy to his own use the yearly dividends and profits of the respective proportions of his said seven children, in the said 7000 *l.* until their age of twenty-one, or marriage as aforesaid."

Where there is a condition annexed by a will to a devise of real or personal estate, and no notice required to be given, unless the legatees perform the condition, they cannot be intitled, and where there is a devise over, a forfeiture incurs (1).

Wick v. Huttewell
1. *Phillips* 362.
Phillips v. Phillips
3 *Ans* 287.
Hutcheon v. Coth
5 *Mylon* 145.

The testator died soon after: his brother is likewise dead, and *Gabriel Tabourdin*, the nephew of the testator, is dead; *Cassandra* married the defendant *Graydon*, July 25, 1740, without consent; and *Peter* married the day after without consent; *Gabriel* junior, arrived at his age of twenty-one, but died before the forfeitures were incurred by his sister *Cassandra's*, or his brother *Peter's* marriage without consent (2).

The bill is brought by the persons who have married the other children of *Gabriel Tabourdin*, the elder, with consent, to be let into their respective shares forfeited by *Cassandra* and *Peter*.

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(1) See *Hervey v. Aston*, ante 1 vol. 361. and the note at the end of that case. *Small*, and *Dorothy, Western*.—These were either married after 21, or with consent.

(2) *Mary* married *Chauncy, Elizabeth*,

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Mr. Solicitor General counsel for the plaintiff: One point made by the defendants, in their answer is, that the executors may still consent: But he said, the case of *Fry versus Porter*, 1 Vent. 199. was directly contrary, for at the time of the marriage only (1), the consent must be given, because then it must immediately go over to the other children if without consent; so that the executors upon consenting afterwards cannot bring a bill to take it from the other children.

Wrottesley versus Wrottesley, June 1, 1743. *Vide ante* 584. is almost in point; but, besides, the executors do not say, that they approve of it now.

From the moment of the children's marrying with consent, or arrival at twenty-one, they are intitled to the capital, and then there is an end of the dividends; so that the produce of the stock in the father's hands cannot make a fund for the benefit of the children, as part of his personal estate; nor will the defendants be intitled to a share of this produce; for this was certainly given only in lieu of maintenance, and from the death of the father, the interest must follow the same fate with the capital.

Mr. Attorney General counsel for *Peter Tabourdin*.

The first marriage without consent was by *Cassandra*, the second was by *Peter*.

It is insisted by the plaintiffs, that *Cassandra* and *Peter* have forfeited their shares in the 1500 l. and 7000 l. *South-sea* stock.

The question then is, Whether *Peter* has forfeited or not?

There is a fact which the gentleman on the other side have industriously omitted; *videlicet*, that the executors did not give him any notice of the condition; and though it was determined in *Fry versus Porter*, not to be necessary, yet that was, because real estate was forfeited, and it is, the law says there, it is not necessary, and therefore, in that case, a person must bring himself within the terms: But I do not recollect it has ever been determined so, where personal estate has come in question; for then it is in the nature of a legacy, and must be governed by rules of the civil law: Where the whole vests in the executors, they ought to give notice; for where there are legacies in a will, they are bound to pay them, though not demanded.

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Mr. *Brown* on the same side: The words *manner and proportion* in the first clause may have another construction than to extend in general to both clauses, and if it can be construed to any other sense, the court will incline to it, as forfeitures are not favoured, and that the testator did not intend to involve the 1500 l. with the 7000 l.

He argued that *Gabriel Tabourden's*, though it was a contingent interest in these forfeitures, yet was transmissible to his representatives, as he lived to be 21, for a possibility is assignable in equity, and the defendants in that light are intitled: for there is no case that makes it necessary for the person, who has a contingent interest, to be living, when it takes place. *Vide King versus Withers*, *Cases in Lord Talbot's time*, 117. *Corbet*

(1) *Reynish v. Martin*, *post*. 3 vol. 331.

versus Palmer, 26 Feb. 1734. and Pinbury versus Elkin, 1 P. CHANCERY & GRAYDON.
Wms. 562.

Did thereby also give to his executors 7000 l. South-sea stock, in trust to transfer 1000 l. South-sea stock to each of the seven children at their respective ages of twenty-one years or days of marriage, they marrying with the consent of, &c.

As this is given payable at a future time, these two different periods must be considered separately, and relate only to the transfer either at twenty-one, if that happen first, or on the day of marriage, if that happen first (1): and though there is a marriage *without consent*, yet it is payable at twenty-one afterwards, if they live to arrive at that age.

Mr. Chute for Mrs. Cassandra Graydon: This is a mere legacy and not given by way of portion, for the testator was not obliged by a debt of nature to provide for them; and therefore ought to be governed by the rules of the civil law, which discourages forfeitures, especially with regard to the 1500 l. to which there is no forfeiture annexed.

Mr. Solicitor General in reply said, that the words *manner and proportion* have two different constructions, the word *proportion* relates to the shares both in the 1500 l. and the 7000 l. and the word *manner* relates to the time when it becomes payable, viz. the arriving at twenty-one and the marriage *with consent*, according to the rule that *verba relata inesse videntur*.

As to what has been insisted on with relation to Gabriel, junior, that a share in the fortunes forfeited by Peter and Cassandra vested in his representatives.

It is impossible it could take place, for Cassandra and Peter both married before twenty-one without consent, and on such marriage it is given over immediately, so that their fortunes were forfeited before the time of vesting came, and are therefore absolutely gone.

LORD CHANCELLOR,

Several questions have been made at the bar.

First, Whether there is any forfeiture at all.

Secondly, What will be the extent of it.

Thirdly, What shares the parties claiming under the forfeiture are to take.

Now as to the first, it is extremely plain there is a forfeiture incurred by a marriage *without consent*, or otherwise this case would not be consistent with the rest of the cases on this head.

The only excuse attempted to be made is, that the defendants had no notice of the condition in the will of Badouin.

I shall lay this out of the case, for where there is a condition annexed by a will to a devise of real or personal estate, and no notice required to be given, nor any person obliged to give notice, there the legatees must perform the condition, or cannot be intitled: and if they do nor, where there is a devise over, a forfeiture incurs.

(1) Garbut v. Hilton, ante 1 vol. 381.

CHAU
GRA NCVY.

Nor, in the reason of the thing, do I see any difference at all between real and personal estate: and therefore where nobody is bound to give notice, the parties must themselves take notice.

It is said *the executors* should have given notice, but the testator has laid no such obligation upon them, neither do the executors take any beneficial interest, whether the condition be performed or broken.

The second question is, What will be the extent of the forfeiture? whether the forfeitures are confined only to the 7000*l.* or by relation extend to the 1500*l.* likewise.

This is not quite so clear, but I am however of opinion that the forfeiture extends to both: nor can I make any other construction, without contradicting the testator's own intention, and making the court contradict themselves.

For the testator's putting the two sums in different clauses, was on account of the gift of the produce of the 1500*l.* stock to his brother during his life, or otherwise he would have thrown the whole into one clause.

The original proportion would have been a division into sevenths, but is different when one or two or more of the devisees marry *without consent*, and therefore the proportions arise, and are to be regulated by the several contingencies as they happen.

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The word *manner*, as has been rightly argued, takes in every thing.

To one for life, and to *B.* on certain conditions and restrictions, and to *C.* in *forma prædicta*, will take in every condition and restriction in the preceding limitation to *B.*

Suppose an estate be limited to one for life, and to *B.* on certain conditions and restrictions, and to *C.* in *forma prædicta*, this will take in every condition and restriction in the preceding limitation to *B.* this expression may be found in conveyances even to this day, but very commonly in admittances to copyholds.

The third *question* will be, what are the shares and proportions the several parties claiming under this forfeiture are to take.

Mrs. *Cassandra Graydon* was married on the 25th of *July*, and *Peter* the next day.

It is insisted by *Peter's* counsel, that he is intitled to a share in *Cassandra's* forfeiture.

It would be very extraordinary that *Peter* by marrying *without consent* should forfeit his own fortune, yet take advantage of the very same offence in his sister which he had committed himself.

See the clause in the will, beginning with, *and in case any of the said children should die, &c. the share or shares, &c.*

What is the meaning of the words *share or shares*? Why the whole that the children shall be intitled to, as well the original as the contingent portions, shall go and be transferred, &c. and this brings it to the case of Mr. *Bendysb* in *Wrottesley* versus *Wrottesley*, where I determined in the same manner on the word *portion*, which is not at all more general than the word *share* in the present case.

"And did thereby also give to his said executors, &c. in trust
"to transfer, &c. to be at their respective ages of twenty-one
"years or days of marriage, *they marrying with the consent, &c.*"

It

It is said this is a condition not annexed to the age of 21, but confined to the day of marriage only.

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GRATTON.

But if they marry without consent before 21, the condition is broke; and it was the intention of the testator, that there should be no new time which should arise, but the legacy to be absolutely gone.

Therefore, this making a forfeiture of the whole avoids the absurd construction, that they may take advantage of the very same breach of condition which they have been guilty of themselves.

As to the point relating to *Gabriel*, I am of opinion, as he attained his age of 21, that it vested in him, notwithstanding he died before the contingency of his brother and sister's marrying without consent happened, and therefore his representative is equally intitled to a share of the forfeiture with the other children, as that fact has taken place, and the dying before makes no difference, for where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life-time of the first devisee, yet if real *his heir*, if personal *his executor*, will be intitled to it; for though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable, and transmissible to the representative of devisee. *Vide Higden versus Williamson*, 3 P. Wms. 132 (1).

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Where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life-time of the first devisee, yet if real his heir, if personal his executor, will be intitled.

Lord Chancellor declared *Chauncy and his wife* were intitled to one fifth part of the portions so forfeited, *Western and his wife* to another fifth, *Small and his wife* to another fifth (2), and one of the defendants, the executor of *Gabriel* the younger, to another fifth.

The share of *Gabriel* under the will (3), his Lordship said, must be divided into six shares, and the forfeiting children must take equally in this with the others (4).

(1) See *Bates v. Dandy*, ante 208.

(2) *Rene* to one other fifth, and *Elizabeth Small* to one other fifth as administratrix to *Gabriel* the son: subject to be distributed as part of the personal estate of *Gabriel Tabourdin* the son.

(3) " And as to the proportion of the forfeited shares so vested in the said administratrix of *Gabriel Tabourdin* the son."

(4) *Reg. Lib. A.* 1742. fol. 673.



Gasper & Fitzjones. 1. The
Anon. July 21, 1743. Rehearings. Case 344. 169

IN decrees to account before a Master, formerly there was a clause in it, that if there should be any *special matter*, in taking the account, the Master might state it specially, but decrees now are drawn up without this clause, and a Master may state *special matter notwithstanding*.

A Master in taking an account, may state *special matter*, though he has no express direction from the decree to do it.

Case 345. *Paul versus Birch, July 21, 1743, stood for Judgment.*

Where a factor makes an agreement for the hire of a ship with the master, on his own account, for 48*l.* a month, and not on the part of the mer-

chants his principals, they are not liable, nor their goods put on board, to satisfy the Master's demand, but they are liable to pay the factor the freight for the cargo; and as he was bound by the charter-party, which gave the master a specific lien on the goods, he has a right to be paid in the first place, before the assignees of the factor under a commission of bankruptcy against him, who stand only in the place of the bankrupt.

Anderson v. Vauxeller

4. 2. 6. 160

W. Hall v. Bartholomew
Brigg. N. C. 555.

TWO persons who are now bankrupts hired a ship of the plaintiff at the rate of 48*l.* a month, and executed a charter-party, by which the goods to be put on board were made liable to the plaintiff: some merchants, who live in the *West Indies*, loaded this ship with goods, and allowed the bankrupts their factors 9*l.* a ton for the carriage.

The plaintiff insists, that as the bankrupts are not able to satisfy him the whole hire of the ship, that the merchants are liable to do it in respect of their goods, which are bound by the charter party.

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LORD CHANCELLOR,

Two questions arise in this case, the first between the plaintiff and the assignees of the bankrupts; and the second between the plaintiff and the defendants the merchants.

As to the assignees, the question is, Whether the charter-party is such a specific lien on the goods as to pay the plaintiff, or whether the right is in the assignees, and the plaintiff shall come in only as a creditor.

I am of opinion that the right is in the plaintiff, for as the bankrupts themselves are bound, of consequence the assignees are who stand in their place (1).

But what seems to be of great consequence to merchants in general, is, Whether the cargo is further liable to make up the deficiency to the plaintiff upon what is due to him for freight.

First, Whether it is liable under the general law of merchants.

As to the general law, the cargo is no doubt liable to pay the freight, or the expence of carrying the goods.

What occasions the difficulty is, that the 48*l.* a month is termed for the freight of the goods: but improperly, for it is rather for the hire of the ship, the bankrupts being at full liberty to put in what master they pleased, and also the mariners.

In *Molloy de jure maritimo*, 496. sec. 9. it is said, "If a factor enter into a charter-party with a master for freightment, the contract obliges him; but if he lades aboard generally, the goods, the principals, and the lading are made liable, and not the factor, for the freightment."

Now the present case is stronger: the bankrupts the factor enter into the contract for the hire of the ship, and the mer-

chants enter into a contract only for the freight of the goods ; and is like the case of a common carrier, where, if a person loads his waggon, the goods are liable to pay him.

PAUL v.
BACH.

The next consideration is, Whether the bankrupts themselves, by virtue of the *charter-party*, can bind the goods of the merchants to answer the freight.

I think not.

The merchants are no doubt liable to pay the bankrupts the freight, but it would be very hard to make the goods liable to satisfy the plaintiff's demand.

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Consider what a factor is. *Molloy*, in the book just now cited, page 493. *sec. 1.* says, " A factor is a servant created by " a merchant's letters, and taketh a kind of provision called " *factorage*; such persons are bound to answer the loss, which " happens by overpassing, or exceeding their commission ; but a " simple servant or apprentice can only incur his master's displeasure."

Where a factor becomes bankrupt, it has been held, if the merchants' goods are not mixed with his own, they shall go to the merchants.

If a factor becomes bankrupt, and the merchants' goods are not mixed with his, they shall have them.

The bankrupts made an agreement with the master on their own account, and not on the part of the merchants, and therefore the merchants are not liable. Otherwise they would be in the hardest case imaginable, for they would be liable to any private agreement between the occupiers of a ship, and the original owners of it.

A person that lets out his ship to hire, ought to take care that the hirer is a substantial man, and sufficient to make good the hire, and it is his business to look into this, and if the persons who hire are not competent, the master must suffer for his neglect.

Whoever lets his ship to hire, must take care the hirer is substantial, for if he be not competent, for his neglect,

the master must suffer

Whatever hardship therefore may be on one hand, to the person who lets out to hire, the hardship is much greater on the other side ; and what gives an additional weight to the merchant's case, is the great consequence this is to trade in general.

It is said that some of the defendants, the merchants, were indebted to the bankrupts, and therefore they might detain the goods to pay themselves, and that by the *charter-party* the plaintiff stands in the place of the factor, and has the same lien on these goods.

A factor may detain goods to pay customs in any place, or for salvage, but more doubtful as to any other pretence. *Vide Wise-man versus Vandeput*, 2 *Vern.* 203.

To pay customs, or for salvage, a factor may detain goods.

Case 346.

Walker versus Jackson, July 22, 1743 (1).

1 Will. 24 S. C.
Bum. 302. S. C.
The personal
estate under B.'s
will passes as a
specific legacy
to the execu-
trixes, and shall
not be applied in
exoneration of
the real estate.

Handwritten:
Hans delieur
Hans delieur
3 C & F. 82.

THE questions in this cause arose out of the following will of *Beauprè Bell*, who was indebted to the plaintiffs upon bond, and seised in fee of lands in *Cambridgeshire, Norfolk, and Lincolnshire*, to the amount of 1500 *l. per annum*, and possessed of a considerable personal estate.

"I will that all my estate in the county of *Lincoln*, or a sufficient part thereof, be sold as soon as my executrixes conveniently can, for the payment of my lawful debts and the legacies hereafter mentioned, and the expence of my funeral, which I leave to their discretion: I give to Mrs. *Emma Marshall* one annuity or yearly rent-charge of 200 *l.* to be raised out of all my estate not here after otherwise engaged in the county of *Norfolk*, to be paid her half-yearly."

Then he gives several specific legacies and a miniature picture, and several prints to *Emma Marshall*.

"Lastly, I appoint the abovementioned *Emma Marshall* and *Dorothy Beauprè* joint executrixes of this my will, written with my own hand this 10th of *December, 1740*."

On the 21 of ——— 1741, the testator added these words to his will: "And I give and devise to them all my personal estate not herein before devised; and then executed it over again in the presence of three witnesses, whose names appear under it."

A bill has been brought by the plaintiff and other bond creditors of the testator, against Mr. *Jackson*, who married *Dorothy Beauprè*, one of the executrixes, and likewise heir at law to the testator, and against *Emma Marshall* the other executrix, to set forth the testator's personal estate possessed by them, and for administering of assets sufficient to pay the plaintiffs, and for the sale of the *Lincolnshire* estate.

The principal question was, whether the personal estate ought in favour of the heir at law to be applied in exoneration of the real estate.

LORD CHANCELLOR,

That the personal estate is to be applied for the payment of debts in the first place, is the general rule, and it is as certain that a testator cannot as against his creditors exempt the personal estate.

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But against his heir at law, or the devisee of his real estate, he may substitute the real in the room of the personal estate, and charge the debts upon another fund, which is not in its nature primarily liable.

There are several different ways of giving *real estate*, subject to his debts.

A testator may do it by a devise of the real estate for a term for years, in order to pay the debts; or he may do it by way of

charge, and let it descend upon the heir at law : or he may do it by direction only, without devising it over.

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JACKSON.

But let him do it by either of these three ways, (of which doing it by way of charge is much the strongest), yet neither of them shew the real estate is to be primarily applied.

For if a man devises real estate by way of trust, either to be sold for a term of years, or the inheritance to be sold, if he has done nothing to exempt the personal estate, it shall be primarily liable (1).

Though a real estate be devised to be sold, yet if a testator has done nothing to primarily liable.

exempt the personal, it shall be

The general rule of this court, though delivered sometimes in one form, and sometimes in another, is, that the personal estate shall be applied, unless there be express words, or a plain intention of the testator to exempt his personal estate, or to give the personal estate as a *specific legacy* (2), for he may do this, as well as give the bulk of the *real estate* by way of specific legacy.

The rule is, personal estate shall be first applied, unless there are express words, or a plain intention of the testator to exempt it, or to give it as a specific legacy.

Therefore, in the present case, there must be a manifest plain intention in this will to exempt his personal estate.

And I am of opinion there is such a manifest plain intention to give the personal estate as a specific legacy to his executrixes, and to exempt it from his debts.

See the devise of his *Lincolnshire* estate.

After giving several specific legacies, he says lastly, I appoint the abovementioned *Emma Marshall* and *Dorothy Beauprè* joint executrixes of this my will.

If the testator had rested there, it was only making them executrixes, and the personal estate would then have been applicable to exonerate his real.

But the testator some time after adds these words : *And I give and devise to them all my personal estate not herein before devised*, and in a formal manner re-executes his will : and this I must take notice of, as it must be made part of the probate.

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This is an extreme strong circumstance to shew the intention of the testator, and indeed unfurmountable, and a much stronger case than if inserted in the will when first executed ; but if inserted at first, I should even have thought it a strong case of exemption.

(1) So *Gower v. Mead*, *Pre. Cha.* 2. *Dolan v. Smith*, *Pre. Cha.* 456. *French v. Chichester*, 2 *Vern.* 568. *Stapleton v. Colville*, *Ca. temp. T.* 208. *Hastwood v. Pope*, 3 *P.W.* 325. *Ferreyes v. Robertson*, *Bunb.* 302. *Brudenel v. Boughton*, *note* 273. *Bridgman v. Dove*, *post.* 3 vol. 202. *Lord Inchiquin v. O'Brien*, 1 *Willf.* 2. *Amb.* 33. *S. C.* 1 *Bro. Cha. Rep.* 58. *S. C.* *Samwell v. Wake*, 1 *Bro. Cha. Rep.* 144.

(2) So *Adams v. Meyrick*, 1 *Eq. Ao.* 271. pl. 13. *Banfield v. Wyndham*, *Pre. Cha.* 101. *Wainwright v. Rendleaves*, *ibid.* 451. *Stapleton v. Colville*, *Ca. temp. T.* 202. *Phipps v. Annesley*, *ante* 58. *Bicknell v. Page*, *ante* 79. *Ancaster v. Mayer*, 1 *Bro. Cha. Rep.* 454. *Webb v. Jones*, 2 *Bro. Cha. Rep.* 60. See *Gallon v. Hancock*, *ante* 439. note 1. *Minor v. Wickstead*, 3 *Bro. Cha. Rep.* 627.

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JACKSON.

The additional words upon the republishing the will, do not mean what the testator had before specifically devised out of the personal estate.

A provision out of the real estate for one executrix will not bar her, neither will specific legacies given to one, bar either of the residue in the personal estate, but are put in only to give one a preference of the other.

Making a provision out of his real estate for one executrix, will not bar her, neither will the specific legacies given to one executrix bar either of the residue in the personal estate, for they are put in to give one a preference of the other (1), and to distinguish their two cases, for he intended Mrs. *Marshall* should have particular parts.

As the will stood originally, the executrices would have had very little benefit from it, and therefore upon the re-execution the testator threw in this clause to give them the personal estate by way of specific legacy; when this circumstance is considered, the cases already adjudged are not so strong as the present. *Adams versus Meyrick, Eq. Caf. Ab. 271. at the Rolls*, was a much weaker case*: those cases, where rest and residue are given by will, are the weakest of all, and several cases upon these words, where it has been held that the personal estate is not exempted from payment of debts in the first place.

A testator may give an executor the personal estate, as a legacy, and exempt from debts.

It is no objection here, that the persons to whom it is devised are made executrices, for a testator may give an executor the personal estate as a specific legacy exempt from debts, as well as to another person.

The words debts, legacies, and funeral expences, are only words of stile, and no weight to be laid upon them. *Bradyb versus Lisle* the 30th of November, 1732, was not so strong as this, nor *Hall versus Broker, Gilbert 73.* nor *Stapleton versus Colvill, Trin. T. 1736 (2)*, there was only a power given which speaks most strongly that it was intended merely in aid of the personal estate.

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The case of *Bampffield versus Windham, Prec. in Chan. 101.* and *Wainwright versus Bendbraves, 2 Vern. 718.* do not come up to this, but are much weaker than the present.

Upon the whole, a stronger circumstance cannot be than the republishing his will, and an alteration from what it was before; and unless it is construed to be his intention to exempt his personal estate in favour of the executrices, the words are fruitless and vain, and do no more in their favour than the

(1) *Vide Blinkborn v. Feast, 2 Vef. 27. post. 3 vol. 226.*
Wilson v. Ivat, 2 Vef. 166. note 1. (2) *Ca. temp. Talb. 202. S. C. 2 Eq. Cox's P.W. 550. Southcot v. Watson, Ab. 372. pl. 21. S. C.*

* A. by will gave several pecuniary legacies, and after devises lands to trustees, in trust that they do and shall by mortgage or sale pay his debts, legacies, and funeral expences; then devises all his goods, chattels, and household stuff in such a house to B. and then goes on in these words: *All the rest and residue of my personal estate I give and devise to my wife, whom I make sole executrix.* Sir Joseph Jekyll held, that the residue of the personal estate belonged to the wife as a specific devise, and that the words were to be understood, the residue of what he had not before particularly devised, not the residue after debts paid. *Adams versus Meyrick at the Rolls, Hill. T. 1724.*

will, as it originally stood would have done before; therefore these words can have no other signification than to exempt his personal estate.

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The real estate was by his Lordship decreed to be sold, or a sufficient part thereof, for the payment of the testator's debts.

Morris and Elizabeth his Wife versus Burrows and others, Case 347.
July 26, 1743.

2 Eq. Caf. Abr.
272.pl. 39.S.C.

THIS cause comes on now for further directions after the Master's report, and it is upon this case:

First heard before Lord Hardwicke on the 3d of February,

1737. (See the case fully stated in *Tracy Atkyns's Reports*, 1 vol. 399).

John Burrows at his death left issue five children, the plaintiff *Elizabeth Gyles* and *John* and *Mary* married to *Woolaston*, and *Ann* to *Edward Rose*, which *Gyles*, *John*, *Mary* and *Ann* were advanced by their father in his life-time.

A freeman of London by will took upon him to dispose of all his estate, as well the orphanage

as the testamentary part; where some of the children shall elect to abide by the custom, and others to take by the will, *their shares of the orphanage part shall not accrue to that part, but shall go according to the disposition of the father.*

He by will gave legacies to all his children, and to other persons, and the residue of his estate real and personal he gave to his sons *John* and *Gyles*, and his daughters *Mary*, *Elizabeth*, and *Ann*, their heirs, executors and administrators, equally to be divided.

The testator died on the 7th of *October*, 1732, leaving issue as aforesaid, and *Gyles Burrows* alone proved the will, and possessed his personal estate, which was more than sufficient to pay the testator's debts.

The plaintiff's counsel at the hearing of the cause argued, that the testator being a freeman of *London*, and leaving such issue as aforesaid, had not power to dispose of his personal estate by his will, but the same ought to be distributed according to the custom of the city of *London*, and the testator having given plaintiff *Elizabeth* no more than 900*l.* on her marriage, which is far short of what he gave the rest of his children, and not having by his will advanced her equally with his other children, insisted the will ought to be set aside.

The defendants insisted that the testator and the plaintiff *Elizabeth* before her marriage, together with *George* and *Phillis Burrows*, two other children, before the testator became a freeman, entered into an agreement with him, whereby they did release their right to any part of his personal estate by the said custom.

The plaintiffs brought their bill to set aside the agreement and the will, and that *Gyles Burrows* may account with the plaintiffs for testator's personal estate, and that plaintiffs may bring their advancement into hotch-pot, and be paid their

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customary shares of the testator's personal estate, and of the dead man's part.

The cause was heard the 3d of *February*, 1737, at which time his Lordship decreed "the agreement to be voluntary, "and under the circumstances of the case ought not to be considered as binding between the testator and his said children, "and that the plaintiffs are intitled to their customary share "of the orphanage part of the testator's estate, which is a "moiety of the clear personal estate; but that the plaintiffs "electing to claim by the custom, are not to have any benefit "by the will; and that the defendants *Gyles Burrows, John Burrows, Mary Woolaston, and Ann Rose*, the children of the "testator, were to be at liberty to make their election, whether "they will take by the will of the testator, or by the custom of "*London*."

The defendants *Mary Woolaston and Ann Rose* have not yet under the decree made their election, whether they take by the will only, or by the custom, because they do not know what will be the consequence of such election.

LORD CHANCELLOR,

The question is, Whether, when some elect to abide by the custom, and others to take by the will, the shares of the latter shall go among the others, or go according to the will.

I thought at first that it should go according to the will; but no case being cited, and it not appearing to have been considered on the part of the plaintiffs, I was willing to give them time to look into cases, and hear what could be alledged in their favour.

Mr. *Chute* cited a case of *Rawlinson versus Rawlinson* before Lord *Harcourt* the 8th of *July* 1714 (1). There a freeman had nine children, of whom one chose to abide by the custom, the other by the will: Lord *Chancellor* decreed that child one ninth, and the other eight ninths of the personal estate to be subject to the disposition of the testator's will.

[629] This case has been generally cited to shew the custom is, that (when a wife is compounded with) the orphanage is one moiety; but, according to Mr. *Chute's* state of it, it is a case in point. I think it agreeable to the reason and equity of the thing, and that the present case differs entirely from the case of a wife compounded with.

In the case of *Townsend versus Townsend*, Lord *Talbot's* opinion *arguendo* seemed to be the same way; though this point happened not to be material, as the election was not made there, and so was not mentioned in the decree.

No person can take by a will, and at the same time do any thing that shall destroy the will.

This is a question not of the custom, but depending on the equity of this court, which is that no person shall take by the will, and at the same time do any thing that shall destroy the will (2).

Where

(1) S. C. cited *Pre. Cha.* 537. p. 2. 644.

(2) *Norris v. Mordaunt*, 2 *Vern* 581. *Sireafeld v. Sireafeld*, *Ca. temp. Talb.* 175.

Where a father has only disposed of the testamentary part, they may take both; but where he has taken upon him to dispose of both, they cannot, because it is inconsistent, and must one way or other break in with his disposition.

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BURROWS.

The children of a freeman may take both parts, when the father has disposed of the testamentary only.

Therefore I must put them to make their election.

If they elect to take by the will, it is only a submission that their part shall go according to the disposition of the father.

Now making the share of the child who elects to take by the will to accrue to the orphanage part, is, to give it contrary to that election: it is not directly, but in consequence, letting those who take by the custom, take benefit by reason of the will.

But it is said that letting it accrue to the orphanage part, is agreeable to other cases.

As for example, that of a wife compounded with; but this depends on a different reason, viz. the custom which divides the testator's estate, in case a wife is compounded with, into two parts, as if there was no wife (1): it has been compared likewise to the case of children provided for, but this also depends on the custom.

The custom, where a wife of a freeman is compounded with, is to divide his estate into two parts, as if there was no wife.

The present is a case of children all capable of taking within the custom, and depends on the election of the child, and not on the act of the father, which was the case put by Mr. Brown.

Is any wrong done to the children who take by the custom? No certainly, for they have all that they would have had, if all had taken by the custom.

Therefore, as the whole depends on the election of the children, and as all might have taken by the will so may any one.

The distinction between acts of the father and the children is plain, and the election being that this part shall go by the will, if the court was to declare that this share should go to the orphanage part, it is contrary to the election: and therefore, if there had not been a case in point, I should have determined it this way: and I dare say it was taken to be so at the time of pronouncing this decree.

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Therefore I must declare the share of *Anne Rose*, who elects to take by the will, accrues to the testator's estate, and to go according to his will.

176. *Boughton v. Boughton*, 2 Fes. 12. *Clark v. Guise*, 2 Fes. 618. *Unet v. Wilks*, Amb. 430. *Newman v. Newman*, 1 Bro. Cha. Rep. 185. *Macnamara v. Jones*, 1 Bro. Cha. Rep. 481. *Frank v. Stancish*, 1 Bro. Cha. Rep. 588. *Blake v. Bunbury*, 4 Bro. Cha. Rep. 21. *Finch*

v. Finch, 4 Bro. Cha. Rep. 38. *Idem* *Hearle v. Greenbank*, 10 B. 3 vol. 715. *Forrester v. Cotton*, Amb. 388. *Cutt v. Shorvell*, Amb. 727. (1) *Vide Medcalfe v. Ives*, ante vol. 64. 403. *Read v. Snell*, post. 644.

-Case 348. *Story versus Lord Windfor and others, July 30, 1743.*

On a plea of a purchase for a valuable consideration without

THE defendant pleads a purchase of the eighth part of a colliery, for a valuable consideration, without notice.

notice of the plaintiff's title, it is sufficient to aver, that the person who conveyed was seised or pretended to be seised, when he executed the purchase deeds, but where purchaser sets up a fine and non-claim as a bar, he must aver that the seller was actually seised.

*Today. Wightwick
Resp. coll. 4/5.
Johnson. Rowe
Russell. 5/4*

Mr. Noel for the defendant went chiefly upon the possession of 50 years in the seller of this estate.

LORD CHANCELLOR,

Where you plead a purchase for a valuable consideration without notice of the plaintiff's title, it is sufficient to aver, that the person who conveyed was seised, or pretended to be seised, at the time that he executed the purchase deeds; but if the purchaser sets up a fine and non-claim as a bar to the plaintiff's right, it is not sufficient to aver that at the time the fine was levied, the seller of the estate *being seised, or pretending to be seised, conveyed, &c.* but you must aver he was actually seised; it is not necessary indeed to say that he was seised in fee, for if you aver he was seised *ut de libero tenemento, & sic seised, & sic quidem finis se levavit*, it will do (1).

A colliery is a trade, and therefore an account may be taken of the profits here.

Though the plaintiff's is a legal title, yet he is proper in coming into this court, because this is not a title of land, but of a colliery, which is a kind of trade, and therefore an account may be taken of the profits here (2).

The defendant sets up first an equitable bar, and secondly a legal bar.

To allow the first, it must be brought within the rules of this court.

A purchaser's denying notice at or before the execution of the deeds is not sufficient, he must aver that he had none at or before the payment of the money.

The first objection was, That there is not a sufficient denial of notice, because it is not averred the purchase money was *paid before notice, but only that the purchaser had no notice, at or before the time of the execution of the deeds.

[*631] As it stands upon this plea, the money might not be paid before notice.

And if it be the established rule of this court, that notice must necessarily be denied at or before the execution of the deed, and at or before the payment of the money;

Then there is not a proper averment here, and therefore I am of opinion this *denial of notice* is not sufficient, unless it had gone farther, and shewn that the purchaser had no notice before he paid the money (3).

(1) *Vide Baker v. Pritchard, ante 389. post. 3 vol. 262. Sayer v. Pierce, 1 Ves. 238.*

(2) *Vide Bishop of Winchester v. Knight, (3) Vide Fitzgerald v. Burk, ante 397. P. W. 406. Jesus College v. Bloome, Hardingham v. Nickolls, post. 3 vol. 304.*

Then

Then the plea must rest upon the other bar, which is a mere legal one, and yet is equally good in equity, as in law, provided it is pleaded with proper averments.

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Lord WINDSOR.

If it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar, and not affect him with notice so as to make him a trustee for the person who had the right, because this would be carrying it much too far; for the defect upon the face of the deeds is often the occasion of the fine's being levied.

If a person purchases an estate, which he sees has a defect upon the face of the deed, yet the fine will be a bar, for that defect is the very occasion of levying the fine.

If a man indeed purchases from a trustee, and levies a fine, he stands in the place of the feller, and is as much a trustee as he was (1): so in the case of a grantee of a mortgagee, though he levies a fine, that will not discharge the equity of redemption.

A person who purchases from a trustee who levies a fine, is as much a trustee as he was; the same as to a grantee of redemption.

grantee of a mortgagee, his fine will not discharge the equity

But there are fines and non-claim that will bar, notwithstanding notice at the time of levying.

The material objection was that the plaintiff only claims one 8th part, and then it is a fine levied by one tenant in common, and will not bar the other.

It is so in many cases; but it will be carrying it too far, to say, that a person in possession of the whole, levying a fine of the whole, shall not bar (2).

The operation of a fine and non-claim is not by turning it into a right, but it is by force of the bar arising from the statute of non-claims.

The operation of a fine and non-claim, is by force of the bar arising from the statute of non-claims.

It has been said the statute of limitations will not run against one jointenant, or tenant in common, unless an actual ouster is made; and to be sure there ought to be some ouster; but if after such ouster a tenant in common or jointenant continues in the possession of the whole for twenty years, it is a bar (3).

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If after an ouster of the rest, one tenant in common or jointenant continues in possession of the whole for 20 years, it is a bar.

So in the case of a fine and non-claim by one tenant in common, it will bar his companion, or him who claims a share, if he does not call the person levying to an account of the profits, for this has always been admitted to be evidence of an actual ouster.

Another objection has been made, That it could not be said to be a mine open, because there was no coal way; but that will not hold, for though this might not be so great a temptation to a person to claim, yet it was enough to induce him to make an entry.

(1) *Vide Bovey v. Smith*, 1 Vern. 60. 149.

(2) *Doe ex dem. Fishar v. Proffer*, Corup. 217.

(3) See *Reading v. Royson*, 2 Salk. 423. *Prince v. Heylin*, ante 1 vol. 494. *Fair-claim ex dem. of Epson v. Shackleton*, 5 Burr. 2604. *Doe ex dem. Fishar v. Proffer*, Corup. 217.

But

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In pleading there
is the same strict-
ness in equity,
as in law.

But as to the objection that the fine is not sufficiently pleaded to be a bar, I own I cannot get over it, because in pleading there must be the same strictness in equity as in law.

For it ought to have been pleaded as an actual seisin in the seller, and not that he being seised, or pretended to be seised, &c.

But I will not over-rule the plea, only order it to stand for an answer till the hearing, with liberty to except, save as to matters of account.

Lord Chancellor the next day cited the two following cases in support of the rule as to pleading a fine. *Reading versus Raydon* 2 *Ld. Raym.* 829. *Earl of Suffex versus*—— 1 *Ld. Raym.* 310.

Case 349.

Weyland versus Weyland, May 1742.

Now Where a husband by a settle-
ment before
marriage was
obliged to do
a particular thing
for the benefit
of the wife, and
he did a thing
equally satisfac-
tory, the court
will presume a
satisfaction by
implication (1).

Wood v Wood
7 *Blas. 183.*

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in Green
Collyer. 527.

Douglas

Miller

Mass. 518.

MARK Weyland, on his marriage with the defendant in 1709, by marriage settlement conveyed ten long annuities, of ten pounds a year each, to trustees, in trust to permit him to enjoy them during his life; then to permit his intended wife to enjoy them for her life, with a remainder to all the children of the marriage equally: This limitation was subject to two provisos: *First*, That the husband and wife, with the consent of the trustees, might dispose of these annuities absolutely, (and no provision is made for any other settlement in case they did so): *A second proviso*, That it should be lawful for Mrs. Weyland, after the death of her husband, to disclaim the benefit of these annuities, and in such case she should enjoy such share or interest of and in his personal estate, as she would be intitled to, in case he was a freeman of London at the time of his death; and in case she elected to take as a freeman's widow, the annuities were to go to the executors and administrators of Mr. Weyland.

About the year 1720, Mr. Weyland (2), without the consent of his wife, sold these annuities, and converted the money, arising by sale, to his own use.

In 1741, Mr. Weyland, upon the marriage of his eldest son, settled 5000*l.* old and new South-sea annuities upon himself for life, then upon Mrs. Weyland for life, remainder to his son for life, with remainder to his intended wife for life, with remainder to the issue of the marriage, &c.

In 1742, Mr. Weyland, who never was a freeman of London died intestate, leaving a widow and several children: And this bill was brought by some of the children, to have an account and distribution of his estate; and the two following points were made.

- (1) *vide Peacock v. Glefoek, 1 Cha. subscribed the said annuity orders into the S. S. Company, and received the money arising thereby to his own use.*
Rep. 45.
 (2) *With the consent of Ann his wife*

First,

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First, Whether the estate for life, limited to Mrs. *Weyland* by the settlement in 1741, is not to be taken as a satisfaction for her interest in the long annuities, in the settlement of 1709, and consequently obliged to elect whether she will take that, or come in as a freeman's widow, and wave the benefit of it?

Secondly, Whether before the son can be admitted to come in for his share of the intestate's estate, he must not bring in the whole 5000*l.* old and new *South-sea* annuities into hotchpot, or only so much as his estate for life in those annuities is valued at.

LORD CHANCELLOR,

I think the wife under the first settlement might, if she waved her annuity, take her share as a freeman's widow, and also her share under the statute of distributions in the testamentary third.

As to the question of satisfaction (1), I am of opinion that she must make her election; and that the provision in the second settlement, is an implied satisfaction for her interest under the first.

By the first proviso the settlement is entirely in the power of the husband and wife, for if they sold these annuities, there was an end of the settlement, and the children could claim nothing; and in such case, there was an end of her election likewise, for that supposes them *in esse* at the time of his death.

So if, after the death of Mr. *Weyland*, she disclaimed these annuities, the children could have no benefit of the settlement, for in that case, they were to go to the executors of the husband.

If no second settlement had been made, she would have had a right as against her husband, who had disposed of these annuities without her consent, to be satisfied for them out of his estate, subject to the election given her by the deed.

This shews that the husband, by his disposition of them, became a debtor to her for this provision, and must be so considered at the time of making the second settlement.

The question then arises upon the effect of the deed, and is, whether or no she can claim the provision made for her, as a mere bounty, and also her share of the personal estate, by the proviso in the first deed.

The general rule is, that where a party to a deed is obliged to do a particular thing, for the benefit of another, and he does a thing equally satisfactory, the intent being answered, this court will presume a satisfaction by implication: Some exceptions I allow to this rule.

Now, if in this case the husband by his act was become a debtor for this provision, it is the same as if he had, by the articles, originally been bound to make it.

If he had been so bound by articles, or a covenant, I know no case wherein this court has not considered such subsequent

(1) *Vide Bellasis v. Uckworth*, ante 1 vol. 426. and notes.

settlement.

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settlement to be a satisfaction: and I think his being bound to do it by his own act is the same thing: Suppose a covenant to settle lands, and the person suffers lands to descend, it is a presumptive satisfaction. *Wilcocks v. Wilcocks*, 2 Vern. 558. *Hern v. Hern*, 2 Vern. 555. and the case of *Brown v. Dawson* 2 Vern. 498. comes very near to this (1).

The presumption of satisfaction is stronger in the case of a deed, than of a will, where a bounty is supposed to be intended.

There is no difference between a deed and a will, except that the presumption of satisfaction is stronger in the case of a deed, than of a will, where a bounty is supposed to be intended.

To this, it has been objected, that this cannot be a satisfaction to her, because it cannot be a satisfaction throughout, (viz. to the children); and the rule has been laid down, that the satisfaction must be commensurate to the thing satisfied, and a total satisfaction to all the parties; and here it is no satisfaction to the children.

But the children by the first deed were left absolutely in the power of the husband and wife, and if she elected her widow's share, they were to be totally deprived: Mr. *Weyland* therefore had no reason to think himself bound to satisfy them, and it was the same thing to them, as they were intitled to an equal share of the residue.

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But I think that the rule laid down is not a right one; the case of *Wilcocks v. Wilcocks*, is contrary to it, for there was a constructive satisfaction, not co-extensive with the deed to all.

Where lands descended have been held a satisfaction, I know no case where the court have directed a settlement of those lands, so as to answer the remainders over.

I think therefore that this provision for the wife is a satisfaction for her demand, under the former settlement, but subject to her power of election, which no act of his could deprive her of.

As to the second question, What the son advanced is to bring into hotchpot;

I am of opinion, That where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement; and it is not the child's estate for life only, that ought to be valued, and brought in (2).

W. on his son's marriage, settled 5000 l. old and new annuities, on himself for life, then on W.'s wife for life, remainder to his son for life, with remainder to his intended wife for life, with remainder to the issue of the marriage: Not only so much as his estate for life in these annuities is valued at, but the value 5000 l. must be brought into hotchpot before the son can be admitted to a share of W.'s personal estate, who did in fact.

(1) *Vide Blandy v. Widmore*, 1 Cox's P. W. 324. note 1. *Lee v. D'Aranda*, post. 3 vol. 419.

(2) His Lordship directed the master to set a value on the said 5000 l. S. S. annuities settled in 1741. for the benefit

of the plaintiff, his wife and children: in computing and settling whereof the plaintiff was to be charged with the full value thereof, deducting only the value of the estate and interest limited to the plaintiff's father for life, &c.

The

The intent of the statute was to make all equal; and if a daughter's portion was covenanted by her husband to be laid out in land, and settled, it will be very strange if that should make any alteration, or give her a better right to the residue of her father's estate.

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WEYLAND.

So if the son had died in the life of the father, leaving children, if his advancement only was to be brought in, they would be obliged to bring nothing into hotchpot, and yet would be intitled to an equal share with his other children, which would be directly contrary to the intent of the statute.

Lord Hardwicke declared, *That the provision made for the defendant Ann Weyland, the widow, by Mark Weyland, the intestate, in his life-time, by giving her an estate for life in the 5000l. South-sea annuities, mentioned in the deed of the 15th of May, 1741, ought in equity to be considered, as a satisfaction to her for the ten long annuities, of 10l. a year each, settled by the deed of the 20th of March 1709.*

But the defendant *Ann Weyland*, the widow, having signified her consent to relinquish any interest or benefit in the 5000l. *South-sea annuities*; and to take a proportion of the intestate's personal estate, as she could have claimed, or been intitled to, in case he had been a freeman of *London* at the time of his decease, Lord Hardwicke declared, that she is intitled to her *widow's chamber and paraphernalia*, and to one-third of the clear surplus of the intestate's personal estate, and to a third part of another third of the said surplus of the personal estate; and that the dividends of the 5000l. *South-sea annuities*, which had accrued, and should accrue, from the death of the intestate, during the life of *Ann Weyland, the widow*, ought to be paid to the administrator of *Mark Weyland*, and considered as part of his personal estate; and decreed, that *the widow's chamber and paraphernalia* be delivered to *Ann Weyland*; and that the clear surplus of the intestate's personal estate, after payment of his debts, be divided into three equal parts, one-third whereof to be paid to *Ann Weyland, the widow*, and one other third to be divided between the plaintiff and the defendants, the other children of *Mark Weyland*; and the remaining third, to be divided into three equal parts, one third whereof is to be paid to the said *Ann Weyland*, and the other two thirds to be equally divided between *the plaintiff and the defendants* (1).

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(1) *Reg. Lib. B. 1742. fol. 365.*

Chatteris v. Young.

2. Russell. 183.

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CASES Argued and Determined

Dord v. Dutcliffe

Praser v. Byng

2 Simons. 245.

1. Russell. 180.

Cafe 359. *The Duke of St. Albans* versus *Miss Caroline Beauclerk and others*,

Guy v. Sharp February 16, 1743. At Lord Chancellor's House, by Consent.

1. Russell. 509

IANA Dutche's Dowager of *St. Alban's*, made her will in 1724, and after disposing thereby of some of her personal estate, as to the residue, says, "My intention is to dispose of the residue by a codicil, or codicils, signed by me, which codicil, or codicils, I do direct and appoint to be part of, and to have the full effect of my last will and testament, notwithstanding any defect in point of form, or otherwise." "like quantities or things, though given in different writings, unless it can be shewn it was the testator's intention to make them additions.

Legacies of greater sums, values, or quantities, given by a last, than by a first codicil, are not additional, but augmented ones.

Legacies of less sums, or quantities, or values, given by the last, than by the first codicil, are not additional, but exemptions, or diminutions *pro tanto*.

Waring v. Pind On the 19th of October 1738, she made a codicil; in 1740, and 1741, she made two others, not to the present purpose: On the 24th of September 1741, she made a fourth codicil, under which, the particular legatees claimed additional legacies: But the residuary legatee contended it was by the frame and meaning of it intended to be substituted in the place of the first codicil: After very long arguments, the Lord Chancellor declared, he thought it a case of very great difficulty; and took time till the 6th of July 1743, when he gave his opinion, stating largely the two codicils; the material parts whereof are as follows; comparing each article with the opposite columns.

10. Simons 453.

Sciose v. Lowther

2. Hare 424.

Mash v. Gladstone

13 Simons 261

Law v. Fair

4. Hare. 201

Fidd v. North

2. Phillp. 1.

Fidd v. North

14. Simons 463.

First Codicil.

By virtue and in pursuance of the power reserved in my last will and testament, I do declare that this writing shall be a codicil to, and part of my will: I give and bequeath, viz.

To Lord *Henry Beaucherk* 1000 *l.*
To Lord *George* — 1000 *l.*
To Lord *Aubery* — 1000 *l.*
To Lord *Vere* 100 *l.* worth of either pictures, china, or japan.

To Lord *Sidney* 100 *l.* worth of either pictures, furniture or plate.

To Lord *James* 100 *l.* of plate, books, or furniture.

To Miss *Caroline* my single stone diamond ring.

To my eldest son my ruby ring.

To his wife my emerald ear-rings.

To Lady *Die* my rubie ear-rings with pearl drops.

To *Webb*, my woman, 500 *l.* for her diligent, honest, faithful service.

To *Catharine Dickens* 200 *l.*

To *Die Wife* — 20 *l.*

To *James Buchanan* — 50 *l.*

To *Biar* the cook — 50 *l.*

To all her servants one year's wages.

To several persons legacies of china.

To several persons small legacies, both specific and pecuniary, of whom no notice is taken in the fourth codicil.

And now I desire that what remains in money, &c. may be applied to the best use, for the advantage and increase of Miss *Caroline Beaucherk's* fortune, which I leave to the fidelity, discretion, and care of my executors and sons, Lord *Sidney*, *Vere*, *Henry*, *George*, and *James*.

Fourth Codicil.

The same introduction, by virtue, &c.

To Lord *Henry* — 300 *l.*

To Lord *George* — 300 *l.*

To Lord *Aubery* — 300 *l.*

To Lord *Vere* 100 *l.* worth of either pictures, china, japan, or furniture.

To Lord *Sidney* 100 *l.* worth of either pictures, plate or furniture.

To Lord *James* 100 *l.* worth of furniture, china, or plate.

The legacies to Miss *Caroline*, her eldest son, his wife, and Lady *Die*, in the same words as by the first codicil,

To my woman *Webb* 600 *l.* for her diligent, honest, faithful services.

To *Catharine Dickens* 200 *l.*

To *Die Wife* — 100 *l.*

To *James Buchanan* — 50 *l.*

To *Francis Biar* the cook 50 *l.*

To *T. Jones* 20 *l.* and to the rest her servants one year's wages.

To Lady *Diana* all her china.

And now I desire that whatever remains in money, &c. may be applied to the best use, for the advantage and increase of Miss *Caroline Beaucherk's* fortune, which I leave to the discretion, care, and fidelity of my executors and sons, Lords *Vere*, *Sidney*, *George*, and *Henry*.

The Duke of
St. ALBAN'S
v. Miss C.
BEAUCLERK.

Upon these two codicils, the principal question that has been made is, Whether the legacies given by the fourth codicil to the same persons, to whom legacies are also given by the first, ought to be considered as additions to, or ademption, or variations of those legacies given by the first; and this question divides itself into different parts, according to the nature of the legacies, *viz.*

First, Where the same specific thing, or corpus is given by both codicils; for instance, the ruby ring, there, in the nature of the thing, it can be but a repetition, there being no pretence there were two ruby rings, or the like (1).

Secondly, Where legacies of the same sum of money, or of the like quantities, or values of things, are given by both, if these had been inserted in the same writing, all the books of the civil law agree they would be only repetitions, and not additions, or duplications; and in the reason of the thing, and according to the best authorities, these legacies being in different writings, will make no difference (2), unless it could be shewn, it was the Dutchess's intention to make them additions; instead of that, I think her intention appears to the contrary.

Thirdly, When legacies of greater sums, values, or quantities, are given by the last, than by the first, I think this falls under the same rule, *viz.* that they are not additional, but augmented or increased legacies.

Fourthly, Where legacies of less sums, or quantities, or values, are given by the last, than by the first, I think these are not additional, but according to the circumstances, and the intention of the testatrix ademption, or diminutions *pro tanto*.

My reasons are borrowed from the text civil law, which (as it often happens) takes these differences more rationally than the commentators do, and in this I have been assisted by an eminent civilian: That text puts it all along on the intention of the testator, and on the will and codicil making but one instrument, it turns the proof rather on the legatee, than the executor. *Digest, Lib. 30. T. 1. De legatis & fidei commissis, Lex 34. Si eadem res sepius legatur in eodem testamento, &c. usque ad finem. Dig. Lib. 34. T. 4. De adimendis vel transferendis legatis. Lex 32. Dis. Lib. 22. T. 3. De probationibus & presumptionibus. Lex 12. De legatis in testamentis & in codicillis relicto.* In *Godefroy's note* upon this law, he lays it down, that the heir is not bound to prove both the will and codicil (3).

There is another law in the *Digest. Lib. 31. T. 1. De legatis et fidei commissis, Lex 47. De duobus exemplariis Bina Titule*

(1) 1 Bro. Cha. Rep. 393.

(2) Lord Bathurst, in *Hooley v. Hatton*, 1 Bro. Cha. Rep. 397. read this passage from Lord Hardwicke's original note thus: "I am of opinion, that upon the reason of the thing, and according to the best writers, these legacies being in different writings, will make no dif-

ference in this case."

(3) "Lord Hardwicke quoted Gutherie, *immo hæres priorem probare innuit esse non tenetur*; but did not speak of proving both will and codicil, as he is represented to do in the report." Per Lord Bathurst in the above-noticed case of *Hooley v. Hatton*.

The text civil law takes the differences and distinctions in cases much more rationally than the commentators do.

testamenti eodem tempore exemplarii causa scripta, ejusdem patrisfamilias proferuntur, in alteris centum, in alteris quinquaginta aurei legati sunt Titio; utrumque legatum nullo modo debetur, sed tantummodo quinquaginta aurei.

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There is a law in the *Code* more apposite than any yet mentioned. *Lib. 6. T. 36. De codicillis Lex 3. De codicillis contrariis, Cum preponatis, pupillorum vestrorum matrem diversis temporibus ac dissonis voluntatibus duos codicillos ordinasse; in dubium non venit id, quod priori codicillo inscripserat, per eum, in quem postea secreta voluntatis sue contulerat, si a prioris tenore discrepat, & contrariam voluntatem continet, revocatum esse.*

The rule to be collected from the passages cited out of the *Code* and *Digest* is, that the apparent intention of the testator must govern in double legacies.

It appears to me from hence, that the true rule which results from all these passages in the *Code* and *Digest*, is this, that the apparent intention of the testator must govern in double legacies; and though most of the commentators say, the proof is to lie on the other side, yet they too put it upon the intention.

This being so, consider, secondly, the internal evidence (1) that appears upon these two codicils, to shew it was not the intention of the testatrix, all these legacies should stand together.

The frame of the will is considerable, for she gives no legacies by that, but shews her intention to give all by the codicil; and though a codicil is in its nature part of the will, (2), and an extension of the intention of the testator, yet it is made stronger by this expression of hers, *et inesse videtur*.

A codicil is in its nature a part of the will, and an extension of the intention of the testator.

I have looked into a large number of the commentators, upon the civil law, who, though they have thrown a great cloud upon the text, yet seem to agree in this, that where it is in the *same writing*, there can be but one legacy demanded (3); and here she has made no codicil, but under the power reserved to her by the will.

But what creates a more material observation is, that she has here, in many instances, given the same specific things by both codicils; and the quantities and values of the goods are as to two thirds the same, and in these variant only in a single circumstance; for instance, 100*l.* worth of *plate, books, or furniture*, in one, and 100*l.* worth of *furniture, china, or plate*, in the other.

Now, can it ever be imagined that she would have done this, if she intended to give two legacies: As to Lord *Vere*, her meaning must be to extend his election as to other sorts of furniture; for in the first codicil, it is to Lord *Vere Beauclerk*, 100*l.*

(1) "Then Lord Hardwicke considered the internal evidence, and added, *by the power reserved in her will, she has shewn her intent to make them one instrument;*" which words are omitted in the report. *Per Lord Bathurst*, in *Hosley v. Hatton*.

(2) *Fuller v. Hooper*, : *Vesf.* 242.

(3) *Garth v. Meyrick and Greenwood v. Greenwood*, 1 *Bro. Cha. Rep.* 30. But *secus* where a larger legacy is given after a less. *Curry v. Pile*, 2*d Bro. Cha. Rep.* 225.

The Duke of St. ALBAN'S v. Miss C. BEAUCLERK. *worth of either pictures, china, or japan, and in the fourth codicil, to Lord Vere Beauclerk, 100l. worth of either pictures, china, or japan or furniture.*

Another reason, and still stronger, arises out of the body of the codicils themselves, and that is, the legacies to her servants, and particularly to her woman *Webb*.

By the first codicil, she says, *I give to Webb, my woman, a legacy of 500l. for her diligent, honest, faithful service*: By the fourth codicil, she says, *I give to my woman Webb a legacy of 600l. for her diligent, honest, faithful service.*

Can it be conceived that she would give these two legacies to Mrs. *Webb*, and all for the same cause.

Where another legacy is given for the same cause, though in different instruments, there shall not be a double legacy.

Now, the commentators on the civil law agree, that where another legacy is given for the same cause, though in different instruments, there shall not be a double legacy (1). *Mincius de Prasumptionibus*, in the margin of *Savinburn*, 4to edit. 201.

As to the legacies of one year's wages to her servants, which is an ordinary gift from persons of rank, it can never be imagined that she intended to give more, and therefore this is a strong corroboration of my opinion as to the point in general.

The gift of the residue, which is *totidem verbis* the same in the first and fourth codicil, makes it manifest the

testatrix intended to substitute one in the place of the other.

As to the legacy of the rest and residue to Miss *Caroline Beauclerk*, which is *totidem verbis* the same in the first and fourth codicil, it is only a *repetition*, and may serve to explain her meaning as to all the other legatees, and makes it manifest she intended to *substitute* one codicil in the place of another (2).

Upon the whole, with regard to the legacies of goods, or money, where the second is less, it must be considered only as a *repetition*, and construed in diminution of the former *pro tanto*; but where it is greater, then as an augmentation, or addition to her bounty.

The greatest difficulty is, as to a legacy given to Mr. *Wise* by the first codicil (subsequent to the giving therein legacies of 1000l. each, to three of her sons, as aforesaid) in these words, "I now allow of 20l. to Mr. *Wise*, out of the 1000l. I leave to my three sons, to be paid quarterly, for his life, or till some place, or other provision be made for him."

No manner of notice being taken of him in the fourth codicil, he is consequently to have his 20l. a year; but then, what fund must it come out of?

(1) This doctrine was admitted by Mr. Justice *Aston* in *Hooly v. Hatton*, and by Lord *Thurlow* in *Ridges v. Morrison*, 1 Bro. Cha. Rep. 393.

(2) *Cambell v. Earl of Radnor*, 1 Bro. Cha. Rep. 271. *Cote v. Boyd*, 2 Bro. Cha. Rep. 521. *Moggridge v. Thackwell*, 3 Bro. Cha. Rep. 517. But the general rule seems to be, that where a testator gives a legacy by a codicil as well as by a will, whether it be more, less or equal,

to the same person who is a legatee in the will, speaking *simpliciter*, it is an accumulation; and it is incumbent on the executor to produce evidence to the contrary if he contests such accumulation. *Wullop v. Hewett*, 2 Cha. Rep. 70. *Husky v. Hatton*, 1 Bro. Cha. Rep. 390. *Fidler v. Hooper*, 2 Ves. 242. *Ridges v. Morrison*, 1 Bro. Cha. Rep. 389. *Fry v. Fry*, *ibid.* 391.

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The two sons' legacies of 1000*l.* each, being now reduced to 300*l.* each; and the third (Lord *Aubery's*) lapsed by his death in the life-time of the dutchess; the strict rule of equity must be observed; *viz.* As the sons' legacies are diminished in the proportion of three tenths each, let each of them pay only three tenths of the 20*l.* *per ann.* and the other seven tenths be paid out of the residuum of the personal estate, which is augmented by the variations.

I shall but briefly consider the cases which have been cited, against the opinion I have given with regard to *the double legacies.*

The first authority was *Swinburne*, *part 7. c. 20. fol. edit. 550.* who says, that where a certain quantity is twice bequeathed, it is twice due, if in two distinct writings, as in a *will* and *codicil*, and puts it on their being in two distinct writings; and it is true, some of the authorities are so, but here, the *codicil* being let in as part of the will, it is otherwise: and *Swinburne* himself, in the *fol. edit. 554.* puts the case, that if the testator do bequeath to one man 100*l.* and afterwards, in the same testament, bequeath to the same man an 100*l.* the second disposition is understood to be but a repetition of the former, and all but one legacy, &c. and afterwards, in the same paragraph he says, where two equal sums be left to one person, the one quantity in one writing, and another quantity in another, suppose 100*l.* in the testament, and another 100*l.* in the *codicil*, here the legatary may recover 200*l.* as two several legacies, except the executor prove the testator's meaning to be contrary.

Now, in the present case, this is plainly proved by the best kind of evidence, the words of the will itself.

Menochius, cited in the margin of *Swinburne* 555. says, *Sib eandem causam quantitas sit uni in diversis scripturis relicta, (puta alimentorum causa centum relicta sunt) illa centum tantum semel vastari debent.* *Menoch. Præsumpt. L. 4. Præf. 128. n. 14.*

I cannot see the force of that particular *alimentorum causa*, for why may not the testator double that, as well as any thing else.

Another authority cited against my opinion is, the case of *Masters versus Masters*, 1 *P. W.* 421. before Sir *Joseph Jekyll.*

The first reason there given in *page 423.* will not support the determination; as it is plain by all the books of civil law, where two legacies are given under the same will, that one of them is void; and the only doubt there about legacies to the same person is, where they are given in different instruments: and Sir *Joseph Jekyll* seems rather to have gone on the concluding reason founded on the additional estate, which was a very material circumstance, and if it had been proved here, there was any considerable variation in the dutchess's fortune, it would be very material; but as it is probable he had not time to look into the books of civil law so well as I have done now; and as, in the case put by *Swinburne*, there was nothing of that

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internal evidence which is here; in the decree I shall make, I declare.

"That the legatees here are intitled only to the legacies under the fourth codicil, and shall give these directions to the register: A question arising on the construction of the first and fourth codicils to the dutchess of St. Alban's will, whether such persons to whom any pecuniary legacies, or any legacies consisting in quantity or value in plate, books, japan, china, or furniture, or any of them, given by both the said codicils, are intitled to both the said legacies, or only to one of them; I declare that such persons are not intitled to both, but only to the legacy given by the last codicil (1)."

(1) Reg. Lib. A. 1742. fol. 718.

Cafe 351.

Read versus Snell, August 5, 1743.

LORD CHANCELLOR,

A wife, who, in articles before marriage, is by

THIS is brought before the court upon the following case.

express word: barred of every thing she could claim out of her husband's personal estate, by the *common law, custom of London, or otherwise howsoever*, has no right to *paraphernalia*.

*Widdell, Case v. Read -
Simons - 325
Davis v. Davis
Collyer 416.*

Samuel Read, upon his marriage with the mother of the plaintiff, entered into articles to lay out 11,000*l.* in the purchase of land, to be settled to the use of himself for life, remainder to his intended wife for life, *in bar and satisfaction of her dower and thirds, and all other parts of the real and personal estate of the said Samuel Read, which she might claim by the common law of England, the custom of London, or otherwise howsoever.*

Mr. Read was then a freeman of London, and having issue a daughter, Mary Read, the plaintiff, he made his will, and gave his wife *all her jewels, and personal ornaments* of every kind, with his household goods and furniture; and after giving a few legacies out of that part of his estate which, as a freeman of London, he had a power to dispose of, he left the residue to his wife.

In 1734, a bill was brought by the present plaintiff, for an account of her father's personal estate, and to have the 11,000*l.* laid out pursuant to the articles, and to have her orphanage share placed out for her benefit.

In the decree upon this bill there is a particular direction, *that the mother, Mrs. Read, shall have her paraphernalia, and all other just allowances.*

Mrs. Read upon the 2d of May, 1734, made her will, and after some small legacies, gave the rest in the words following:

or 24

“ As for the residue of my estate, real and personal, whereof I shall be possessed, or to which I shall be intitled at the time of my decease, I give and bequeath all, and the whole of it, to my brother-in-law *William Snell*, and *Matthias King*, my executors after-named, in trust, the interest of it to be paid to the use of my dear daughter *Mary Read*, or to be reserved in the hands of my said executors, at their discretion; and also that the said interest, with the principal, be settled *on her, or the heirs of her body* lawfully to be begotten, as they my executors, or the survivor of them, shall think fit; but in case she my said daughter should die, *leaving* no heirs of her body lawfully begotten, then I give and bequeath the said residue as follows: Whereas my husband *Samuel Read*, esquire, deceased, hath left my brother-in-law *William Snell* a considerable contingent legacy already, I give and bequeath one half of the aforesaid residue to my brother-in-law *Matthias King* and *Jane* his wife, and their heirs for ever; and the other half I give to the two daughters of my sister *Sarah Watson*, deceased, they the said *Matthias* and *Jane* his wife, and the two daughters of my sister *Sarah Watson*, or the survivor of them, paying 1000 *l.* out of the said residue to charitable uses, to be distributed at the discretion of my executors.”

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Where executors are made trustees, they can take nothing for their own benefit, unless it be particularly given to them; nor, as they have no ownership, can they alter the interest of the *cestui que trusts*. A direction in a will, that the interest, with the principal of the residue of a testatrix's real and personal estate, shall be settled on her daughter, or the heirs of her body, as the executors shall think fit, will not empower them to give it

from the daughter to the grandchildren; for, in this case, the word *or* must be construed *and*, in order to put a reasonable construction on the will.

After Mrs. *Read*'s death, the plaintiff brought a supplemental bill, and bill of revivor against the executors and contingent legatees, for an account of the personal estate of her father and mother; and to have directions as to the management of the residue for the benefit of the plaintiff, who was then an infant.

Upon hearing of this cause in 1735, Sir *Joseph Jekyll* decreed the former decree to be carried into execution, and as to the surplus, directed it should be laid out in *South-sea* annuities, in trust for the plaintiff during her life, and after her death, then upon trust for her first son, to be paid him when he should attain his age of 21 years, and in case he should die before he should attain that age, without leaving any issue living at the time of his death, then in trust for the second, and every other son in the like manner; and in case the plaintiff should leave no son or sons, or all and every such son or sons should die before attaining the age of 21, without leaving any issue living at the time of their deaths, then upon trust for the daughters of the plaintiff; if but one, to be paid to her at the age of 21 years or day of marriage, and if more than one, then in trust for all such daughters, to be equally divided among them, and paid to them when they should respectively attain their age of 21 years, or be married; and in case the said plaintiff should have no daughter, or in case she should have a daughter or daughters, and all and every such daughter and daughters should die before attaining the age of 21 years, or being married, then upon trust for the several persons to whom the said surplus is limited over by

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READ v. SNELL, the testatrix's will, and the accountant general was to declare the said trust accordingly.

It is from these two decrees that the appeal is brought.

And the complaint against the first is touching the wife's *paraphernalia* being allowed.

The other is as to the whole directions given for the settlement of the residue.

The question as to *the first* will depends entirely upon the articles by which she was compounded with, and by express words barred of every thing that she should claim out of her husband's personal estate by the common law, custom of *London*, or otherwise howsoever (1).

Now her claim to *paraphernalia* must be either by the common law, or the custom; and it is a claim out of his personal estate, for he might in his life-time have disposed of them, and after his death, they remained liable to the payment of his debts.

Where the wife has compounded with the husband, a freeman of *London*, he is to be considered in regard to the custom as leaving no wife.

It was determined in *Rawlinson* versus *Rawlinson*, July the 8th, 1714 (2), and has been so held ever since, that where the wife has compounded with the husband, he is to be considered, in regard to the custom, as leaving no wife (3); it follows therefore that she can have no claim by the custom to the *paraphernalia*, and this case is stronger than the case of *Chomley* versus *Chomley*, 2 *Vern.* 47.

But then it is said that the husband has given it to her by his will; but that makes no difference, because the custom will interpose, and he can only dispose of a moiety of his personal estate.

Therefore the first decree must be varied by leaving out the direction, *that in taking the account of the plaintiff's father's personal estate, the defendant the mother shall be allowed her paraphernalia*, and let the rest be affirmed.

Having said this in regard to the first decree, the material part of this appeal relates to the mother's personal estate.

And there are three questions:

First, What power is given to the trustees by her will.

Secondly, What interest is given by it to the daughter and the heirs of her body.

[645] Thirdly, Whether the devise over, in case the daughter dies leaving no heirs of her body, is good.

The first depends upon a very minute consideration of the penning of that clause in the will, I have stated at large, which is very defectively penned, and therefore it will be necessary for the court to supply words in order to make a reasonable construction.

Here the executors are made *trustees*, and therefore from the nature of the thing are to take nothing for their own benefit (4),

(1) *Vide Glover v. Bates*, ante 1 vol. 439. *Morris v. Burroughs*, ante 1 vol. 403. ante 629.

(2) S. C. cited *Pro. Cha.* 537. ante 628.

(3) *Medcalf v. Ives*, ante 1 vol. 64. (4) *Graydon v. Hicks*, ante 18. *Cope v. Duckenfield*, ante 568.

unless it had been particularly given to them; they have no ownership, and therefore cannot alter the interest of the *cestui que trust*.

It is insisted that in this case, by the express words of the will, they may accumulate the interest during the life of the plaintiff.

But my opinion is, her meaning was, only to give them that power during her daughter's minority, and the words *to be paid to the use of my said daughter*, seem to imply as much.

In the first codicil are these words, *if my daughter shall not live till of age, or be married*, then I give the sum of 10 l. per ann. to J. S. during her life.

In the second codicil she gives her wearing apparel to her servant in case her daughter die under age or unmarried: now it cannot be conceived that she who was taking such minute care of her daughter's interest, as not to give away such a small sum as 10 l. a year, nor even her wearing apparel unless she should die under age or unmarried, should intend to put it in the power of two strangers in blood (for such they appear to be to her) to deprive her of the whole interest during her life.

But there are other words from whence it is argued that the executors have a disposing power, and these are, *that the interest and principal be settled on her, or the heirs of her body, as they shall think fit*.

But I think there is no ground either in law or reason to construe these words so largely.

It was admitted by the defendant's counsel that the word *or* may be construed *and*; as, suppose a devise of land to A. or his heirs, it would be a devise in fee, and in *Plowden's Comment.* 288. b. many cases are put where *or* shall be construed *and* (1).

And there is one case in this very will, where it must be so construed, and that is in the second codicil, where she gives her wearing apparel to her maid, in case her daughter dies under age, or unmarried.

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And can it be imagined that the mother could intend to put it in the power of her executors to give her personal estate from her daughter (of whom she appears to be so fond) to her grandchildren (whom she had never seen).

But then it is asked what power is given to the trustees? I answer a considerable one; they may judge of the fund in which it shall be placed, of the manner in which the settlement shall be made; they may insert proper clauses to make the disposition effectual; and that may be a very material power in the present case: and this is agreeable to the nature and office of trustees; but the other (which has been contended for) would be to give them an ownership, and not an authority.

But there is an insurmountable obstacle to their having this power in the present case, and that is, Mr. King is one of the

(1) *Vide etiam* Richardſon v. Spragg, 2 Ves. 249. Eccard v. Brooke, 1 Cox's 1 P. W. 434. Dolbins v. Bowman, P. W. 434. note 2. 5th edit. Furnival post. 3 vol. 408. Jackson v. Jackson, v. Crew, post. 3 vol. 86. Walsh v. 1 Ves. 217. Brexington v. Edwards, Peterſon, ibid. 193. note.

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legatees over; supposing he should be the surviving trustee, if he had the power contended for, he might direct that the whole should accumulate during Miss Read's life, and so better his own interest.

The words in Mrs. Read's will, in case my daughter should die, leaving no heirs

of her body, is a gift to the daughter for life, with a contingent remainder to such heir of her body as shall be living at the time of her death (1).

As to the second question, I am of opinion it is a gift to the daughter for life, with a contingent remainder to such heir of her body as shall be living at the time of her death.

There have been many cases where heirs of the body have been construed words of purchase; *Lisle and Grey* (2), and *Papillon and Joyce* (3), in the case of a real estate. *Peacock and Spooner* (4), *Doffern versus Bolt* (5), and last of all *Hodgeson versus Buffey*, November 18, 1740, *vide ante*, page 89, which was determined by me upon a thorough consideration of all the other cases, in a question relating to personal estate.

The only doubt therefore is, Whether there are sufficient words in the will to indicate this intention: and I think there are: but as it will be necessary for me to take notice of them in considering the third question, I will reserve myself for it, and therefore what I say under that head must be considered as applicable likewise to the present.

The third question is, Whether the bequest over is good; and this is the principal one in the case.

The general objection is, that the contingency is more remote than the law will allow. *First*, Because it is after a general dying without issue. *Secondly*, Because the original gift is to the daughter and the heirs of her body.

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As to the first part of this objection, I think this does not amount to a limitation over after a general dying without issue, which would certainly be bad, as was determined in the case of *Lord George Beaucherk versus Miss Dormer*, *vide ante*, page 308. (which was heard before me June 17, 1742, as a cause by consent, but was fully spoke to and considered) and so were all the other cases from that of *King and Melling*.

Leaving is a participle of the present tense, and relates to the time of the daughter's dying.

But here the words are, in case she shall die *leaving* no heirs of her body; now the word *leaving* is a participle of the present tense, which relates to the time of her dying.

In *Forth versus Chapman*, (which is reported in 1 *P. Wms.* but I have chosen to take it from my own note of the case, in which I was counsel) the words were (after giving it to the first taker *William Gore*, without the words *for life*) and if my said nephew shall depart this life and leave no issue of his body, then he gives it over. And in that case Sir *Joseph Jekyll* was of opinion that the devise over was void; but Lord *Macclesfield* reversed that decree, which has never been impeached; but many cases have

(1) 2 *Lev.* 223. S. C. *Raym.* 278.
S. C.

(2) 2 *P. W.* 471. S. C.

(3) 2 *Vern.* 43. 295. S. C.

(4) 2 *Vern.* 362. S. C.

(5) See *Hodgeson v. Buffey*, *ante* 89:
note 1.

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been determined in conformity to it; as for instance, *Sabbarton* versus *Sabbarton* Cases in Lord Taibot's time 245. which was determined much upon the same foundation: And, if any thing, this case is stronger, for here it being *leaving*, it ties it up more to the time of dying.

But the second part of the objection has been urged as strengthening this case.

In the case of *Paine* versus *Stratton*, where *Paine* had bequeathed a moiety of his personal estate to his sister *Mary Stratton* for life, and after her decease to the heirs of her body, and the other moiety (upon the devise of which the question arose) he gave to his sister *Anne Paine* and the heirs of her body lawfully begotten, or to be begotten; and for want of such issue or heirs of her body as aforesaid, he gave the same to the children of his sister *Mary Stratton* equally among them, and to their heirs and assigns for ever, immediately after the decease of his said sister *Anne Paine*. And Lord *Macclesfield* was of opinion, upon the probate, that the devise over was void; but the original will being some way or other blunderingly produced, he observed that the words *after the decease of my sister Ann Paine* had been interlined, and in part rased out again, but not in such a manner but they were still legible; and therefore he sent it to a Master to inquire, whether those words were rased out of the will at the time of the testator's death.

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The cause coming on again upon the Master's report before the Lords Commissioners, they were of opinion that it had not been put into a right way of examination, and they therefore respited giving judgment till the matter could be examined in the proper ecclesiastical court, and the parties were at the expence of litigating it in the prerogative court, in order to have these words pronounced part of the will; however that court was of opinion, they ought not to be inserted; upon which the cause coming on again before Lord Chancellor *King*, he was of opinion the devise over was void: upon which an appeal was brought, and the decrec affirmed the 8th of *March* 1726 (1).

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The use I make of this case, is, that it was the opinion of Lord *Macclesfield*, and of the Lords Commissioners, the devise over might be good, though the first devise was to *Ann* and the heirs of her body; for otherwise they would never have put the parties to the expence of trying whether those words, *after the decease of my sister Ann Paine*, were erased.

Another case is, that of the *Attorney General*, at the relation of the *Goldsmiths Company* versus *Hull* (2), where the words were, I give the residue to my son *Francis Hull* and the heirs of his body, to his and their own use; but in case my son should depart this life leaving no heirs of his body *living* at the time of his decease, then I give so much of the said residue, *as shall not have been disposed of by my said son*, to the goldsmiths company. It was held the devise over was not good, not because of the first gift being to his son and the heirs of his body, but because by the

(1) 3 Br. Par. Ca. 257. S. C.

(2) Fitzgib. 314. S. C.

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other words he had given him a *power of disposition*, which was held to be inconsistent with a devise over.

And here it is no more than the common disposition of real estates, which have been frequently given to one and his heirs, with a devise over in case he dies *leaving* no issue.

It has been objected, the words *for life* are not in this will.

No weight has been laid on the want of the words *for life*, where the intention of the testator has otherwise appeared, especially in the case of a *trust executory*, for there this court is bound to see a settlement made agreeable to the intention of the testator.

But though weight has been laid upon those words *for life* when they have been in, yet I do not know that any weight has been laid on the want of them when the intention of the testator has otherwise appeared: but if weight has been laid upon the want of them where it has been a trust executed, yet there can be none where it is a trust *executory*, for where it is a trust executory, this court is bound to see a settlement made agreeable to the intention of the testator; and so it was laid down by Lord Talbot in *Lord Glenzberg and Bosville, Cases in his time*, 3, and was likewise one of the many points determined by me in *Roberts versus Dixwell, Vide 1 Tr. Atkyns 607*. And this case is still stronger, because the settlement is directed to be made according to their discretion; and it is a very proper discretion for them to exercise; but yet I can by no means go so far as the decree at the Rolls has done, for that would not be to construe the testatrix's will, but would be usurping a power of making a new will for her.

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The decree has added several new contingencies; if the daughter *leaves* no heirs of her body at the time of her death; by the will it is to vest in the remainder-men, but the decree gives it them in case none of her children live to attain the age of twenty-one. Therefore as to so much of the decree of the 17th of February, 1735, as gives any directions, or in any wise relates to the trust of the surplus of the plaintiff's mother's personal estate subsequent to the trust thereby directed and declared for the plaintiff during her life, it must be reversed, and instead thereof, I order and decree that in case the plaintiff shall leave any heirs of her body living at the time of her death, then after the plaintiff's decease the clear surplus of such personal estate shall be in trust for and for the sole benefit of such heirs of the body; but in case the plaintiff shall happen to die without leaving any heir of her body living at the time of her death, then after the plaintiff's decease the clear surplus of such personal estate shall be in trust as to one moiety thereof for the benefit of the defendant *Matthias King*; and as to the other moiety thereof, for the benefit of the defendants *Maria Waisen* and *Grillia Waisen*, subject to the charges in the testatrix's will mentioned: and let the Accountant General declare the trust thereof accordingly subject to the further order of this court (1).

A P P E N D I X.

Michaelmas Term 10 Geo. 2. 1736. In Banco Regis.

John Middleton and Ann his Wife versus Thomas Crofts.

JOHN Middleton and his wife were articulated against in the ecclesiastical court, for being married out of canonical hours, without licence or banns, and in a private house; a prohibition was applied for upon a suggestion that the power of the ecclesiastical court was taken away by the statute of 7 & 8 Will. 3. cap. 35. by which penalties were laid on the clergymen marrying, and the parties married without banns or licence, which penalties were to be recovered in the temporal court: In order to bring the matter fully before the court, a rule was made for a prohibition, and that the declaration should be delivered before the first day of the ensuing term. The substance of the pleadings, and arguments of counsel, are fully stated by Lord Hardwicke Chief Justice, in delivering the opinion of the whole court as follows.

In an attachment upon a prohibition, the plaintiffs, the husband and wife, in their declaration, set forth the statute of 7 & 8 Will. 3. cap. 35. whereby a penalty of 100*l.* is inflicted upon every parson, vicar, or curate, marrying any person without banns or licence, and a penalty of 10*l.* on every man so married, to be recovered with costs of suit, by any person who shall inform or sue for the same: That although the lay people of this realm are not subject to, or any way punishable by, any canons or constitutions ecclesiastical; yet nevertheless, that the vicar general of the bishop of Hereford, intending unjustly to oppress the plaintiffs, and to draw the cognizance of a plea which belonged to our sovereign Lord the king to another trial in the court Christian, had, at the promotion of the defendant, articulated against the plaintiffs in the following manner, *videlicet*;

That by the laws, canons, and constitutions of this realm, it was required, that all persons, before they shall be given together in holy matrimony, should obtain a faculty, or licence, from the ordinary, or have the banns published according to the book

Caf. temp.
Hardw. 57.
2 Stra. 1056.
2 Barnard. B. R.
351. 2 Kel.
148. pl. 124.
4 Vin. Abr. 320.
pl. 14. 4 Vin.
Abr. 320. pl. 14.
Andr. 57. 326.
395.

Lysens v Bar
2. Bing. N.C.
Lives v Weston
3. Warr. & L. 6.

Declaration.
Sh. Lamm
Inhab. of H. 4
in the S. 14
11 2 B. 173
Sh. Lamm v Cha
11 2 B. 20.
A. Buck v Macken
5. Mores. R.
305
Barford v Sh.
6. Mores. R.
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of

of common prayer, and be married in the church or chapel, between the hours of eight and twelve in the forenoon; and that all persons offending in the premises, or any of them, ought to be punished by the said laws, canons, or constitutions.

That in the year 1729, 1730, and 1731, and in the year 1732, and before the commencement of this suit, *John Middleton* and *Ann Ellis*, widow, the now plaintiffs, being inhabitants of the parish of *Dore*, in the county and diocese of *Hertford*, without any licence first obtained from their ordinary, and without banns published in the said church, or any church or chapel, procured themselves to be clandestinely married to each other by one *Thomas Allen*, a clergyman, or pretended clergyman, of the parish of *Michael Church Edey*, in the said county of *Hertford*, in his own dwelling-house there, between the hours of one and eight in the morning, and that, by virtue of such marriage, they cohabited with each other as man and wife.

Then the declaration alledges, that the court Christian hath no jurisdiction or cognizance of this matter, and that it is a mere temporal offence punishable by the statute, that the plaintiffs delivered to the defendant the King's writ of prohibition; but, notwithstanding that, the defendant continues to prosecute the plaintiffs in the said court in contempt of the King, to the damage of the plaintiffs, and contrary to the said writ of prohibition.

Plea and demurrer, and joinder in demurrer.

The defendant by his plea denies (in common form) that he hath proceeded in the spiritual court contrary to the writ of prohibition; and for a consultation demurs generally, and the plaintiffs join in demurrer.

Three questions made at the bar.

This cause hath been several times argued, and three questions have been made at the bar.

First, *Whether, by virtue of the canons made in the year 1603, lay persons are punishable by ecclesiastical censures for a clandestine marriage, had without banns or licence.*

Secondly, *If lay persons cannot be prosecuted or punished by force of these canons, whether the court had jurisdiction of such a cause against them by the ancient canon law, received and allowed within the realm of England.*

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Thirdly, *Supposing the spiritual court had a jurisdiction in either of these grounds, whether that jurisdiction is taken away by the operation of the statute of 7 & 8 Will. 3. cap. 35. s. 4. which inflicts a penalty of 10l. for this offence, to be recovered in the King's court.*

First Question.

The first of these questions ought regularly to be divided into two.

First, *Whether these canons made in 1603, which relate to clandestine marriages, do, in the words and provisions thereof, extend to the parties contracting matrimony, or affect the laity in such a case as is now before the court?*

Secondly, *If lay persons are within the words of these canons, whether the authority, by which these canons were made, can bind the laity as to this matter?*

1603.
Canons which relate to clandestine marriages.

As to the first of these two questions, there are five canons comprised in the body of the canons in 1603, that relate to clandestine

clandestine marriages, *videlicet*, Canon the 62d, 101st, 102d, 103d, and 104th. That no minister, upon pain of suspension *per Triennium ipso facto*, shall celebrate matrimony between any persons without banns or licence, nor at any time but between the hours of eight and twelve in the forenoon, nor in any private place, other than in the church or chapel where one of them dwells, nor, being under twenty-one, without the consent of parents. Canon 101st, 102d, and 103d, relate only to the persons by whom, and the manner in which licences are to be granted, and the security and oaths to be taken on granting such licences: Canon 104th contains an exception of persons in the state of widowhood, out of some of the preceding regulations; and provides, that any ordinary or officer offending in the premises, shall be suspended for six months; and that every licence granted contrary to the directions before mentioned should be void, as if there had never been any granted; and the parties marrying by virtue thereof, shall be subject to the punishment appointed for clandestine marriages.

It seems to be plain from hence, that none of these canons do in the words or terms of them affect the parties contracting, except the last clause of the 104th canon, which relates to persons married by colour of void licences, granted without the circumstances before prescribed; but that is not the present case, for the libel does not alledge any void or irregular licence to have been obtained, and that the marriage was thereupon had, but contains a positive charge of a clandestine marriage, without banns published, or any licence at all, which is a different fact, and not within this provision. - For this reason, it does not appear to us that the provisions of the canons of 1603, do extend to the laity in such a case as is now before the court.

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But, supposing lay persons might be within the words of the canons in 1603, the next consideration is, whether the authority, by which those canons were made, can bind the laity as to this matter. The authority whereby they were made is well known to have been by the bishops and clergy, in convocation convened by the king's writ, allowed to treat of, and make canons by the royal licence, and afterwards confirmed by the king under the great seal; but the defect objected to them is, that they never were confirmed by parliament, and for this reason, though they bind the clergy of this realm, yet they cannot bind the laity.

This is a question of very extensive learning and great consequence, upon which there is some appearance of variety in the law books, notwithstanding which, I always understood till it was disputed in this cause, that the law in latter times has been universally taken to be, that the canons of 1603 did not bind the laity for want of a parliamentary confirmation.

And upon this ground, I presume, it was that my brother *Wright* (that argued last for the defendant in this cause, who is plaintiff in the ecclesiastical court) expressly admitted, that these

these canons did not *proprio vigore* bind the laity, and insisted only on the second point, that the ancient usage of the church of *England*, and the ancient canons received by and allowed in this nation, do bind them.

But as the contrary doctrine was insisted on by the other counsel, who argued on the same side, and had a right to urge every thing which they thought material for their client, it is become necessary to examine and determine a point of so great consequence to the constitution of *England*, in order to settle the law thereupon.

The court of opinion the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity.

And, upon the best consideration we have been able to give it, we are all of opinion, that the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*. by their own force and authority; for there are many provisions contained in these canons, which are declaratory of the ancient usage and law of the church of *England*, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons.

The reasons upon which they found their opinion.

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In treating of this question, it might serve for illustration and ornament, to look back into the history of the ancient councils of this island in the *British* and *Saxon* ages; but any one who will be at the trouble of looking through Sir *Henry Spelman's* laborious collection on this subject, will find that it would furnish very little materials towards fixing the point of law as to the obligations of canons, because those councils were frequently mixed assemblies, composed partly of clergy, partly of laymen, and sometimes of the King, with his nobility, and at other times some of the commons are mentioned to be present; but whether they had suffrages in those councils or not, and in what manner they were sent thither, whether by election, or by what other kind of constitution, is very uncertain and obscure.

The like may be said of several councils held in the earliest times, following the coming in of the *Norman* line; and afterwards there is frequently a mixture of the legatine authority, which arose merely by papal usurpation.

Upon this important question, therefore, it is safest for judges to proceed upon sure foundations, which are, the general nature and fundamental principles of this constitution, acts of parliament and the resolutions and judicial opinions in our books, and from these to draw our conclusions.

No new laws can be made to bind the whole people, but by the King, with the advice and consent of both houses of parliament, and by their united authority.

To argue first from the general nature and fundamental principles of this constitution, nothing is so undoubtedly such, as that no new laws can be made to bind the whole people of this land, but by the King, with the advice and consent of both houses of parliament, and by their united authority; neither the King alone, nor the King with the concurrence of any particular number or order of men, have this high power. To cite authorities for this would be to prove that it is now day, and therefore

therefore I will only refer to the parliament roll, 2 *H. 5. Pars 2. No. 10.* and the case of proclamations, 12 *Rep. 74.*

The binding force of these acts of parliament arises from that prerogative which is in the King, as our sovereign liege lord, from that personal right which is inherent in the peers and lords of parliament, to bind themselves, and their heirs and successors, in their honours and dignities, and from the delegated power vested in the commons, as the representatives of the people, and therefore lord *Coke* says, 4 *Inst. 1.* these represent the whole commons of the realm, and are trusted for them by reason of this representation, every man is said to be party to, and the consent of every subject is included in an act of parliament; but in canons made in convocation, and confirmed by the crown only, all these are wanting, except the royal assent; here is no intervention of the peers of the realm, nor any representation of the commons.

Every man may be said to be party to, and the consent of every subject is included in an act of parliament; but in canons made in convocation, and confirmed by the crown only, all these are wanting, except the royal assent.

Indeed, Dr. *Andrews* endeavoured to avoid the force of this objection, by observing, that the obligation of an act of parliament did not arise from the actual representation of all the people of the land, but from an implied representation constituted by the law, for that, in fact, many ranks of men amongst the commons had no votes in the election of members in that house, and the minister of every parish in *England* has the care, and is the representative of his particular parish in matters spiritual, and votes in election of proctors for the clergy.

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The fact is undoubtedly true, that many amongst the commons have no votes, as persons having no freeholds, freeholders in the ancient demesne, women, &c. but that does not make it cease to be an actual representation of the people: No body ever imagined, that, in exercising a right of this kind, every individual person could possibly join, but some rule of qualification must be laid down, and that hath been taken from the most worthy, and such as have the most valuable and fixed sort of property, which also, to avoid confusion, hath been restrained by later acts of parliament.

But it is quite a new notion, unheard of in the law books, or in any writer upon our constitution, that the rector or vicar of a parish is the representative of his parish, in voting for convocation men: Who chose this representative of theirs? Not the parish themselves, but the bishop of the diocese, or some lay patron. Could this bishop of the diocese, or the lay patron, delegate a power for the parishioners to bind them in any act of legislation? Surely it never entered into any body's head, that they could do it: But, not to dwell upon this novelty, it is contrary to the very writ constantly issued to the metropolitan to summon his convocation, the words of which are *convocari facias totum clericum cujuslibet diocesis vestre provincie.* It is contrary also to the premunitory clause in the writ of summons to every bishop, which directs in a more particular manner, who of the clergy shall come in person, and who by their representatives in this form, *Quod decanus et archidiaconus in propriis personis ad dictum*

tem capitulum per unum hominem electum per duos procuratores totius plenum et sufficientem populum ab ipsis capitulis et ceteris divisiim habentes predictis die et anno perperam r. emergit ad congregandum, &c.

In the convocation, the whole clergy of the province are either present in person or by representation.

The words and common sense of these writs import, that only the clergy are called; that the proctors of the clergy are merely representatives of the clergy, and have their powers from and for them, without so much as an implication on any thing further: Agreeable to this, Lord *Cole*, 4 *Inst.* 322. says, in *duo convocationibus*, the whole clergy of the province are either present in person, or by representation.

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From hence arises the substantial distinction between the ancient canons, made in general councils of the church, and confirmed by the *Roman* emperors after they embraced the Christian faith, and the canons made either in a national or provincial synod of the church of *England*, and confirmed by the crown; as to the extent of their obligation, there is no doubt but the former bound all the subjects of their empire, as well laity as clergy, so far as they were lawful in respect to the subject matter; but the difference lies in the root from whence the obligation springs.

The binding force of ancient canons over laymen, was derived from the supreme legislative power being vested in the person of the emperors.

The binding force of these ancient canons over laymen, was not derived from any particular prerogative or supremacy of the emperors, as head of the church, but from the supreme legislative power being vested in his person; for after the *Rex Legis*, whereby it is said to be ordained, "*Quod principi placuit legis habet vigorem*," (*Julian. Inst. lib. 1. tit. 2. §. 16. Digest, lib. 1. tit. 4. de constitutionibus principum*) the whole power of making laws, however originally gained by usurpation, was devolved upon the emperor; and by consequence, when a canon was made by the council, and confirmed by the emperor, it had the concurrence of every thing necessary to make it a complete law.

In *England* it is otherwise, where the king has but part of the legislative power.

But the case is far otherwise in *England*, where the king has but part of the legislative power, and therefore the argument made use of in the case of *Matthews* and *Burdet*, 2 *Salk.* 673. though it be only the reasoning of counsel, is of great weight, and such as I have heard no satisfactory answer given to.

The answers which have been offered are two: *First*, That the reason of the emperors confirmation of any canon, was only to give it a civil sanction; but though this was said, it was not proved; and I do not find any temporal penalties annexed to the ancient canons of the church.

The other answer was, this argument shews, wherever the law has fixed a power, *that* includes the consent of the people; and therefore, in *England*, the consent of the people is included in the royal confirmation; but this hath not the shadow of an answer, because it begs the main question, which is, Whether the law of *England* has deposited in the crown the sole power of confirming canons to bind the laity, without the advice and consent of parliament.

Another argument, of like kind with the former, is, that by the *English* constitution, the power of binding by new laws, and that of charging with taxes, are concomitant and co-extensive, and those who have authority to do the one, can do the other: thus the parliament makes laws obligatory upon the whole nation, and they impose taxes to be levied upon all the people: but the clergy in convocation never pretend to have power of granting tenths or fifteenths, or other taxes to charge any persons but themselves; and by analogy from hence, can make no canons or ordinances but only to bind themselves, i. e. the body there assembled, or represented.

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To pursue this argument a little further, and to infer the consequences which naturally result from it, it seems almost an absurdity to say that the clergy in convocation cannot charge the laity with one farthing by way of tax or imposition, cannot even create a new fee to be paid to them, and yet may erect new laws to bind them *in re ecclesiastica*, for disobeying which they shall incur the penalty of excommunication, which is to be carried into execution by a loss of their liberty, and a disability to sue for and dispose of their personal estate: this would certainly be to affect the laity in their property in a high degree; and yet it is admitted that the clergy by their synodical acts cannot charge the property of the laity.

And again, the rule of any constitution in a particular case cannot be better found out, than by observing what has been the constant uniform usage and practice in such case. Now the constant uniform practice ever since the reformation (for there is no occasion to go further back) has been, that when any material ordinances or regulations have been made to bind the laity as well as clergy, in matters merely ecclesiastical, they have been either enacted or confirmed by parliament: of this proposition the several acts of uniformity are so many proofs, for by those the whole doctrine and worship, the very rights and ceremonies of the church, and the literal form of publick prayers are prescribed and established; and it is plain from the several preambles of these acts, that though the matters were first considered and approved in convocation, yet the convocation was only looked upon as an assembly of learned men, able and proper to prepare and propound them, but not to enact and give them their force.

Ever since the reformation, the rule has been, that when any ordinances have been made to bind the laity, as well as clergy, in matters merely ecclesiastical, they have been either enacted or confirmed by parliament.

To this way of arguing it hath been objected, that the reason of establishing provisions of this kind by acts of parliament, was for the sake of enforcing them by civil sanctions and temporal penalties, which could not otherwise be obtained, and undoubtedly this was one reason for it; but I cannot be persuaded that it was the only reason, since if it had been the prevailing opinion of those times, that the clergy in convocation could make new canons to bind the laity, it is most unaccountable that they should not think it proper to trust any regulation of the most minute consequence to the proper force of canon or synodical decree, which if lawfully made might be carried into execution.

cution by excommunication, and the consequences attending upon it were a sanction fully sufficient to enforce it.

[658] Upon one of the arguments of this cause at the bar, it was, though not in words asserted, yet endeavoured to be proved that the legislative power of the clergy in convocation is co-extensive with the judicial power of the spiritual courts, and that therefore, as the spiritual courts had an allowed jurisdiction over the laity, as well as the clergy in matrimonial causes, so the convocation had power to make canons to bind the laity relating to marriages. This has been expressed in other words, that their canons are binding on clergy and laity without distinction *in re ecclesiastica*, that is in ecclesiastical matters, or what according to the law of the land hath been reckoned of a spiritual nature.

Lord Hardwicke said, the attempt of counsel to make the power of the convocation in ordaining canons co-extensive with the judicial authority of their courts is full of so much mischief, that it cannot be contended for with any shadow of reason or of law.

But in this argument, a great deal too much is assumed; for the spiritual court has undoubtedly jurisdiction for matrimony, and testaments, commission of administration of personal estates, tithes, and certain crimes, which are all deemed in law in some degree of a spiritual or ecclesiastical nature; and yet, if this argument was true, it would equally follow, that they might make canons to limit the degrees of consanguinity, within which marriage may be contracted, to fix solemnities of making testaments concerning personal estates, to regulate the rights of administrations, and of tithes, and to ascertain the circumstances and evidence of those crimes, especially in things not already fixed by particular statutes; what consequence would this have? Every body sees how it would enable them without consent of parliament to change the law relating to the heirship and descents of lands, and likewise relating to personal estates which are now become of prodigious value, and relating to the payment of tithes which much concerns temporal interests and property, and also as to several crimes whereby the personal liberty of the subject may be consequentially affected upon their significavit. This attempt therefore to make the power of the convocation in ordaining canons, co-extensive with the judicial authority of their courts, is full of such strange consequences, and so much mischief, that it cannot be contended for, with any shadow of reason, or of law.

In truth ever since the reformation, and for some time before, when any alteration hath been made upon the law upon any of those points, it hath been done by act of parliament, witness 32 *H. 8. ch. 38.* about the degrees of marriage, 21 *H. 8. ch. 5.* and 22 & 23 *Car. 2. ch. 10.* relating to administration and the distribution of intestates' estates, and several others which might be enumerated.

If this doctrine had been law at the time of making the statute of *Merton*, 20 *H. 3.* the bishops would have had no occasion to apply to parliament to change the law of *England*, by legitimating issue born before marriage, as they had the jurisdiction to try general bastardy, or whether a child was bastard or mulier, as is expressed in 2 *Roll. Abr. 586. pl. 25.* they might have done it themselves; and though the Lords with one voice gave that

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memorable answer, *Nolumus leges Anglia mutari*, the clergy in convocation might have done it by a new canon.

There was but one case produced to give colour to this argument, and that was 1 *Rol. Abr. tit. Executor* 909. *Letter I. pl. 5.* the words "It is ordained by a canon in 1 *Jac. 1. ch. 93.* " that *bona notabilia* shall be accounted 5 *l.* at least, and no person shall be said to have left *bona notabilia*, if he have not " goods in diverse dioceses to the value of 5 *l.*" and it seems (*semble* is the word) that this canon hath changed the law, if it was otherwise before; in as much as the granting of administration appertains to the ecclesiastical law, and our law only takes notice of their law in this matter, and therefore they may alter it at their pleasure, *Hil. 7 Jac. B. Needham's case*, by the doctors and the court 5 *l.* in every diocese shall be *bona notabilia*.

The case in 1 *Ro. Ab. tit. Executor* 909. relating to *bona notabilia*, is of little authority; and *Rolls* himself expresses his doubt in the place cited; and nothing to the same effect is in the report of the same case, 8 *Co.* 135.

This case sounds strong, but the authority of it amounts to little; for though *Perkins sect. 489. p. 94.* of the old edition, says, that 40 *s.* in every diocese would make *bona notabilia*, yet there were authorities before this canon, that to make *bona notabilia* the value must be 5 *l.* and therefore it does not appear that any alteration was attempted to be made in the law; and *Rolls* himself expresses his doubt in the place cited; besides, if that did appear, it was a matter which did not concern the laity, but was merely a regulation among themselves, making a distribution of the fees of administration between the metropolitan and his diocesan bishops, and their officers.

I take this case to be the same with Sir *John Needham's case*, 8 *Rep.* 135. in which it is material to observe, that Lord *Coke* hath reported nothing to this effect: But let the credit of the passage be what it will, this is a point of too great moment to be determined by a single loose saying in an abridgment, contrary to the general reason and principles of law.

2dly, I come now to the second head of argument proposed upon this question, which was statute law; and as I do not find any positive declaration of the law has ever been made by any act of parliament upon this particular point, so all that can be expected from hence are implications and inferences from whence the sense of the legislature may reasonably be collected.

The several acts of uniformity and other statutes which were mentioned and referred to, when I considered the usage and practice of this kingdom since the reformation, furnish proofs of this nature very material to shew that the parliament have from that period at least been of opinion, that the proper power of making constitutions in ecclesiastical matters to bind the whole nation was in them.

*The only act made *ex professo* upon the subject of the canons, is, that of the 25 *Hen. 8. c. 19.* intitled the submission of the clergy, and restraint of appeals, whereby power was given to that King, *H. 8.* to appoint thirty-two persons to review and reform the ecclesiastical laws, which power was continued by the several subsequent statutes of 27 *H. 8. ch. 15.* 35 *H. 8. ch. 16.* and 3 & 4 *E. 6. ch. 11.* but was never completely carried

The acts of uniformity &c. since the reformation, shew that the parliament have from that period been of opinion, that the power of making constitutions in ecclesiastical matters to bind the whole nation was in them.

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ried into execution; these acts of continuance are not printed in the latter editions of the statute book, but are all in *Rafall's Statutes at Large*.

But even this statute is in the words of it silent as to the persons, over whom the obligation of canons may extend.

It begins with an humble acknowledgment of the clergy, according to the truth, "That the convocation is, always hath been, and ought to be assembled only by the King's writ: then they promise in *verbo sacerdot* that they will never from henceforth presume to attempt, alledge or claim, or put in ure, enact, promulge or execute any new canons, constitutions, ordinances, provincial or other, unless the King's royal assent and licence may be had, to make, promulge or execute the same, and that his Majesty do give his royal assent and authority in that behalf."

Upon these recitals it enacts, "That the clergy, nor any of them from thenceforth, shall presume to attempt to alledge, claim or put in ure, any constitutions or ordinances provincial or synodal, or any other canons, nor shall enact, promulge, or execute any such canons, constitutions or ordinances provincial, by whatsoever name or names they may be called in their convocation in any time to come, (which always shall be assembled by authority of the King's writ), unless the same clergy may have the King's most royal assent and licence to make, promulge, and execute such constitutions provincial or synodal; upon pain of suffering imprisonment, and making fine at the King's will."

It enacts further, "That the King's Highness shall have power and authority to nominate and assign at his pleasure 32 persons of his subjects, half whereof, 16, to be of the clergy, and half of the temporality, of the upper and nether house of parliament, who shall have authority and power to view, search, and examine the said canons, constitutions and ordinances, provincial or synodal, heretofore made; and such of them as the said 32 persons, or the more part of them, shall deem and adjudge worthy to be continued, kept and obeyed, shall be from henceforth kept, obeyed and accepted within this realm, so that the King's royal assent be first had to the same; and the residue of them which the King's Highness and the said 32 persons, or the more part of them, shall not approve, or shall deem worthy to be abolish, abrogate and make frustrate, shall from thenceforth be void and of none effect, and never be put in execution within this realm."

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"Provided that such canons, and constitutions and ordinances provincial or synodal, being already made, which be not contrariant nor repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed as they were before the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined by the said 32 persons, or the more part of them, according to the tenor, form, and effect of this present act."

In this statute and the several acts of continuance nothing occurs, as was observed before, touching the persons over whom the obligation of canons may extend; but notwithstanding that, two observations arise upon them material to the present consideration.

First, That both the King and the clergy thought it necessary, or at least very expedient, to take along with them the concurrence and authority of parliament, for abrogating part of the ancient canons, and for confirming and establishing such part as was to remain in force: if the opinion had then prevailed, that the convocation, with the consent of the crown, could have ordained canons to bind the whole realm, laity as well as clergy, the King with the convocation (who had just then given the strongest evidence of their submission to his will) might have found many and easy ways of doing it without resort to parliament; but the wisdom of those times chose to rely upon this other method.

Secondly, If the design of reviewing and reforming the ancient canon law, by commissioners authorized by those acts of parliament, had been effectually carried into execution, every body must have admitted, that the system of ecclesiastical laws which they had approved, would have derived its binding force over the whole realm from the legislature; for nothing is more certain in law than this, that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the person that executes it. This must be obvious to that King who passed the first of those acts of parliament, who was as jealous of his prerogative, as any Prince who ever sat upon the *English* throne.

I proceed now to consider the resolutions and judicial opinions in our books upon this great question.

The first case which has been cited on this subject is, that of the Prior of *Leeds*, 20 H. 6. 12. abridged by *Brooke*, tit. *Ordinary* 1. The clergy of the province of *Canterbury* had given a tenth to the King, and in the act of convocation, whereby it was granted, had inserted a proviso, that no person should be discharged from being a collector of this tenth by force of any privilege or exemption; the archbishop appointed the prior of *Leeds* to be collector thereof, and to pay it into the Exchequer. The prior came into the Exchequer, and shewed forth letters patent of exemption, whereby the King had discharged him from the collection of any tenths and fifteenths, and prayed they might be allowed; upon some doubts among the barons, the cause was adjourned into the Exchequer-chamber, before the Lord Chancellor and all the Judges, and doth not appear to have been determined; but the argument both at the bar and on the bench turns upon this point, whether the proviso in the act of convocation (to which the prior himself was to be considered as a party) did not amount to an estoppel or a waiver of this privilege for that time, and whether he should not have insisted on his exemption in convocation, and have got it excepted out of the proviso.

Clear from 25 H. 8. c. 19. that both the King and the clergy thought it necessary to have the authority of parliament for abrogating part of the ancient canon; and establishing such part as was to remain in force.

Nothing is more certain in law than this, that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the person who executes it.

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In the prior of *Leeds*'s case, 20 H. 6. 12. it was laid down, that the ordinary by his convocation had power to make constitutions provincial, by which (*ceux de Sainte Eglise*) shall be bound, but they cannot do any thing which shall bind the temporality.

Upon this occasion *Hodges*, who was then Chief Justice of the King's Bench, said, in respect to what had been insisted that the prior should have had an allowance of his letters patent in the convocation, it is nothing to the purpose, for they have power of things merely spiritual; upon this *Newton*, then a judge of the court of Common Pleas, said, the ordinary by his convocation had a power to make fasting-days and holy-days, but not to allow or disallow the King's patent; and that they have power to make constitutions provincial, by which (*ceux de Sainte Eglise*) shall be bound; yet they cannot do any thing which shall bind the temporality, and this opinion was not denied.

Said in the case of the Abbot of *Waltham*, *M.* 24 *E.* 4. 44. *b.* that the convocation has not power to bind any temporal matter, but only that which is spiritual, as to ordain fasting days and holy-days, and they are only spiritual judges.

The next case in order of time is that of the Abbot of *Waltham*, *M.* 24 *E.* 4. 44. *b.* in which the very same point came again in question, before all the judges in the Exchequer-chamber upon the like letters patent of exemption granted to that abbey. No judgment was ever given upon the principal point, for the cause was determined upon a fault in the pleading; but in the arguments both of the counsel and of the judges much is said of the power of the convocation. *Catesby* who, as I take it, was King's Serjeant (though he was made a judge of the court of Common Pleas the same term) argues, that the abbot ought not then to have advantage of this exemption, because he was a party to the grant, and concluded by the proviso; for said he, among the clergy the convocation is as strong as the parliament is among persons temporal; and by an act of parliament every one to whom the act extends shall be bound; for that every one is privy and party to the act of parliament, for the commons have one or two for every county chosen by, and to bind all the county: he goes on, the reason is the same as to the convocation; for every abbot, prior and benefical clerk, is privy and party to the convocation, and therefore it is reason that he should be estopped by acts done in convocation. *Piggot*, who was on the same side, adds, they may bind themselves by an act of convocation, as well as we can bind ourselves by an act of parliament; and therefore it is reasonable that he should be estopped. To this it was answered by *Vavasor*, that the abbot ought not to be estopped, for the convocation had not power to bind any temporal matter, but only that which is spiritual; *videlicet* to ordain fasting-days and holy-days, and they are only spiritual judges; and therefore to say that he ought to have shewn his chart of exemption in convocation, is against reason, for the King's letters patent are merely temporal matter.

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The words *la temporalité* in this case ought to have no stress laid upon them, for though they are in the last edition of the year-book, it is false printed, for in the old edition it is *le temporalité*.

Upon these two cases some observations have been made on the part of the defendant; to the first of these cases it was said by Doctor *Andrew* that *Brooke* had misrepresented it in his abridgment by making *Newton* say, that the convocation could not do any thing *que liera le temporalité* in the masculine gender, for that the words in the original year-book were *la temporalité*; that *le temporalité* means sometimes temporal persons, but *la temporalité* in the feminine always temporal matters or things, and therefore what *Newton* said relates only to temporal rights, and imports that the convocation cannot bind those; but it happens that,

that, in framing this objection, only the last edition of the year-book had been consulted, which is false printed in this place; for I have looked into the old edition, and it is there *le temporalitie* in the masculine gender, as *Brooke*, who probably transcribed it from the original edition, has quoted it, and therefore this criticism falls to the ground.

It was said further, the point in that case was not, whether the convocation could bind temporal or lay persons, but temporal matters or rights, for that the prior of *Leeds* was undoubtedly a spiritual person, and in that capacity liable to be bound; but the question was, whether they could conclude him from claiming the benefit of the King's letters patent of exemption which was a temporal right: this is true, but affords no answer to the inference from *Newton's* opinion; for it is plain he gives his opinion at large, upon the power of the convocation to bind temporal persons as well as things; and considers the King as being affected by that, from claiming the power of allowing or disallowing his letters patent, and that he means temporal persons by the words *le temporalitie* is most plain by the opposition of it to *ceux de Saint Eglise*, which words signify those of holy church, *i. e.* the persons not the matters or rights of holy church; so *Brooke* construed those old *French* words, *ceux de Sainte Eglise*, for, in his abridgment of the case, he uses *le clergy* as a synonymous term for them.

The like objection hath been made on the case of the Abbot of *Waltham*, that what is there said related only to the convocation's power of binding temporal matters or rights, and not temporal persons in *re ecclesiastica*, because the abbot was a spiritual person; but this is no answer to what is there laid down, because it is clear to any one who will attentively consider it, that it is taken for granted throughout the case, that they could only bind the clergy. *Catesby*, whose point was to carry the strength of the convocation's act as far as possible, sets out with it that amongst the clergy, *entre le clerks*, the convocation is as strong as the parliament amongst persons temporal; and then he expressly draws a comparison between the representation in parliament, and the representation in convocation, and makes the very reason of the clergy's being bound, to be, that they are all personally present or represented in convocation; and upon this ground *Pigott* says, they may bind themselves. What *Vavasor* says afterwards is plainly not intended generally, but by way of exception out of this indefinite proposition, that the clergy in convocation may bind themselves; for he says notwithstanding this, the Abbot ought not to be estopped, for the convocation had not power to bind any temporal matter, but only that which is spiritual; the meaning is, though the convocation hath power to bind the clergy, yet the power doth not extend over the temporal rights even of the clergy themselves, but to matters spiritual; but this claim of exemption is a temporal right of the Abbot's, and therefore he, though a clerk, is not bound *quoad hoc*. The nature of the question, and the course of the reasoning in this case, seems to me to require this way of understanding it;

That *Newton*, in the opinion he gave on the power of the convocation, means temporal persons, as well as things, is plain by the opposition of it to *ceux de Sainte Eglise*, which words signify the persons not the matter or rights of holy church.

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When the case of the Abbot of *Waltham* came before all the Judges in the Exchequer chamber, *Vavasor* said the power of the convocation doth not extend over the temporal rights of the clergy themselves, and the Abbot's claim of exemption from collecting tenths, being a temporal right, he thought a clerk was not bound.

and if so, the point I am now insisting on, will appear to be there allowed on both sides.

The exception at the end of the convocation case, 12 Rep. 72. is misprinted, and no weight is to be laid upon it.

Canons that have been allowed by general consent within this realm, and not repugnant to the laws thereof, are still in force as the King's ecclesiastical laws.

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At an assembly of the Lord Chancellor, Lord Keeper, the Lords of the Council, and all the Justices of England in the Star-chamber, it was held, that deprivations of puritan ministers by the high commission court were lawful.

The clergy are bound by canons to submit only by the King's authority to bind the laity, and must be confirmed by parliament.

Lord Raymond and Lord Chief Justice Eyre in a MS. report of the case of the Bishop of St. David's and Lucy, agree with the printed report of Serjeant Carlew 425.

The next case is called the *convocation case*, 12 Rep. 72. in which the like opinion is laid down, founded on these two year-book cases that are there cited; there is indeed an exception at the end of the case relating to spiritual causes, or which concern spiritual persons, but that sentence is certainly misprinted, for it is neither grammar nor sense, and therefore no weight is to be laid upon it, neither will I attempt to explain its meaning.

In *Cardrie's case*, 5 Rep. 31. b. my Lord Coke says, "If it be demanded what canons, constitutions, ordinances and synodals provincial, are still in force within this realm," I answer, that is resolved and enacted by authority of parliament, that such as have been allowed by general consent and custom within this realm, and are not contrariant or repugnant to the laws, statutes and customs thereof, nor to the damage or hurt of the King's prerogative royal, are still in force within this realm, as the King's ecclesiastical laws of the same. Now as consent and custom hath allowed these canons, so no doubt by general consent of the whole realm any of the same may be corrected, enlarged, explained, or abrogated.

Moore 755. case 1043. and *Cro. Ja.* 37. *Trin.* 2 *Ja.* 1. At an assembly of the Lord Chancellor *Ellesmere*, the lords of the council, and all the justices of England in the Star-chamber, this question was proposed, whether deprivations of puritan ministers by the high commission court for refusing to conform to the ceremonies appointed by the canons of 1603, were lawful; to which all the judges answered that they were lawful, and that they had a conference touching this point amongst themselves; the reason was, because the King had supreme power ecclesiastical, which he had delegated to those commissioners, whereby they took a power of deprivation by the canon laws of the realm, and they held, that the King without parliament might make ordinances and constitutions for the government of the clergy, and might deprive them, if they did not obey; but without the King, the clergy could not make constitutions.

In the great case of the *Bishop of St. David and Lucy*, *Popham* 11 *H. 3. Carlb.* 485. it is laid down by Lord Chief Justice Holt, and not denied by any one, that it is very plain, all the clergy are bound by the canons confirmed only by the King; but they must be confirmed by the parliament to bind the laity.

The report of this case in *Salk.* 134. is in this point to the same effect, though not quite so full; but as this opinion appeared to be of great weight, I have looked into two manuscript reports of the same case, taken by hands of the best ability and credit, I mean the late Lord Raymond and Lord Chief Justice Eyre, and find they both agree with the printed report of Serjeant Carlew: the words of Lord Raymond are these: *per Holt Chief Justice*, the clergy are subject to a law different from that to which the laity are subject, for they are obliged to obey the canons, for the convocation may make canons to bind all the clergy, but not the

laity.

laity, and if the clergy do not conform to them, it may be a cause of deprivation.

Trin. T. 3 Anne, Britton versus Standish, reported in *Modern Cases* 188. that case was upon a motion for a prohibition to the ecclesiastical court, in a suit against the plaintiff for not coming to his parish church on *Sundays*, and not receiving the sacrament at *Easter*; against the prohibition it was insisted on, as it has been in this cause, that the spiritual court had this jurisdiction by force of the ancient canon law, received and allowed in *England*, and likewise by the 90th canon in 1603, Mr. Justice *Powell* and *Gould* thought that they had an original jurisdiction in this matter by the ancient canon law; to this Lord Chief Justice *Holt* said, that a jurisdiction allowed to them time immemorial must be taken to belong to them by law; but what I doubt at present is, whether this be so; if there be any ancient canon for it, and received here before 1603, I will agree with you; but if not, no canon since then, though made in full convocation, can *proprio vigore* bind laymen; afterwards a prohibition was granted to declare in as to this point.

No canon since 1603, though made in full convocation, can *proprio vigore* bind lay men.

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Davis's case, *Mich. 5 G. 1. C. B.* The court was moved for a prohibition to a suit in the consistory of the bishop of *St. David's*, against the defendant, being a layman, for teaching a grammar school without licence: but a prohibition was refused, by reason of the clause of the act of 12 *Anna*, to prevent the growth of schism, which was then in force; in that case it was said by Lord Chief Justice *King*, that it was the prevailing opinion the canons did not bind the laity without an act of parliament, there being none to represent them in convocation, and therefore laymen could not be sued in the court Christian for breach of the canon for keeping a school without licence before the making of that act, 12 *A.*

In *Davis's case*, 5 G. 1. C. B. Lord Ch. Just. *King* said, it was the prevailing opinion, the canons did not bind the laity, without an act of parliament, there being none to represent them in convocation.

Having now gone through the authorities that have occurred in support of our opinion, it is necessary to consider those that have been produced on the other side, which I think were but three.

The first was the case of *Bird and Smith*, *Moore* 781. case 1033. *T. 4 Ja. 1.* *Smith* was deprived of the parsonage of *St. Nicholas Aven* in *London* by the high commissioners, for not conforming himself to the canons of the church; whereupon the king presented *Bird*, who was instituted and inducted, but *Smith* would not yield the possession, which was kept by force; a writ *de vi laica amovenda* was awarded out of Chancery, and returned, and *Smith* appealed from the sentence of deprivation, whereupon *Bird* filed an *English* bill of a very unusual nature, praying that he might be put into possession of the living, pending the appeal, and until the sentence should be defeated. The Lord Chancellor *Ellesmere* heard the cause, assisted by Lord Chief Justice *Pepham*, *Coke*, and *Fleming*, *C. B.* who all concurred that a decree should be made to put *Bird* in possession until *Smith* had reversed the deprivation. It is said at the end of that case to have been resolved, that the canons of the church, made by the convocation and the king without the parliament, bind in all matters ecclesiastical,

Said at the end of the case, *Bird v. Smith*, *Moore* 781. to have been resolved, that the canons of the church made by the convocation and the king, without the parliament, bind in all matters ecclesiastical as well as an act of parliament.

fiastical, as well as an act of parliament; for that by the common law every bishop in his diocese, archbishop in his province, and the house of convocation in the nation, may make canons to bind within their own limits; that the convocation of the clergy was once a branch of the parliament of this realm, but afterwards severed from it for their ease, and carried their peculiar function with them into the convocation-house; that a clergyman cannot now be a member of the house of commons, nor a layman of the convocation; and therefore, when the convocation makes canons of things appertaining to them, and the king confirms them, they will bind the whole realm.

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Bird and Smith a very extraordinary case, and the decree such as will not be allowed as a precedent at this day.

No colour of law to say, that every bishop in his diocese, archbishop in his province, and the house of convocation in the nation may make canons to bind within their limits.

Whatever may be the power of convocation to bind the whole realm in matters ecclesiastical, it is no where said in this case they can bind the laity.

Ld. Ch. Just. *Vaughan* of opinion a lawful canon is a law of the kingdom as much as an act of parliament.

It must be owned that this is a very extraordinary case, and the decree such a one as would not be allowed as a precedent at this day, which is a good cause to suspect the reason upon which it is built. It is a decree upon an *English* bill in equity, to turn a minister out of the possession of a living upon a sentence of deprivation from which an appeal was in fact interposed, and to stay all suits at common law, tho' the authority whereby the sentence was pronounced was properly examinable there; in that part of the report which has been relied on in the present case, it is said by the common law, every bishop in his diocese, archbishop in his province, and the house of convocation in the nation, may make canons to bind within their limits; but is there any colour of law for this? Could every diocesan alone make canons for that diocese? Could the metropolitan do it alone without the convocation or synod of his province? Most certainly not, and yet this is delivered.

But laying these peculiarities aside, tho' very strong things are there reported to be said of the power of convocation to bind the whole realm in matters ecclesiastical, yet it is not expressly said they can bind the laity, nor declared in words what persons they can bind; and all that was necessary to the determination of the cause was, that they could oblige the whole clergy of the realm *in re ecclesiastica*, for both the parties before the court were clergymen, and the deprivation was for a spiritual cause.

The next authority was the opinion of Lord Chief Justice *Vaughan* in the case of *Hill* against *Geard, Vaugh.* 327. that if by a lawful canon a marriage be declared to be against God's law, we must admit it to be so; for a lawful canon is a law of the kingdom, as much as an act of parliament, and whatsoever is the law of the kingdom is as much the law as any thing else that is so.

This is certainly true, but proves nothing in the present case, because it is silent, and does not determine what is necessary to make a lawful canon as to this or that particular subject, matter, or person, which is the point now in debate.

In the case of *Grove and Elliot*, *Vent.* 41. Mr. Justice *Tyrril* held, the King and convocation

The last case cited, was that of *Grove and Elliot, Pasch. 22 Car. 2. 2 Vent.* 41. There was a motion for a prohibition to a proceeding *ex officio* in the ecclesiastical court against the

without the parliament cannot make any canons which shall bind the laity.

plaintiff,

plaintiff, for keeping a conventicle in his house; the arguments both at the bar and on the bench turn much upon this, whether the spiritual court had originally jurisdiction of suits, for keeping conventicles; and if so, whether it was not taken away by the statute of conventicles, which was then in force? It was not alleged in the libel that there was any presentment of the office charged, but only that it was *ex parte A. B.* a notary publick; but the register of the court made an affidavit that the curate of the parish had made a presentment; upon this it was objected by the plaintiff's counsel, that this was not sufficient, for that the rector or vicar of the parish, and not the curate, ought to present. This objection was answered by the 113 canon of 1603, which provides that in the absence of the rector, the curate may present.

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From hence an occasion was taken to dispute concerning the force of these canons. Mr. Justice Tyrell said, I hold that the King and convocation without the parliament cannot make any canons which shall bind the laity, though they may the clergy; my Lord Chief Justice Vaughan differed in this, and said, the canons of 1603 are certainly in force, though never confirmed by act of parliament; and that the convocation, with the assent of the King under the great seal, may make canons for the regulation of the church, and that as well concerning laicks as ecclesiasticks, and so is *Lyndwood*: indeed they cannot alter or rephrase the common law, statute law, nor the King's prerogative; all that is required in making new canons is, that they confine themselves to church matters.

Ld. Ch. Just. Vaughan said in this case, that the convocation, with the assent of the King under the great seal, may make canons for the regulation of the church, as well concerning laicks as ecclesiasticks.

It must be admitted to appear from hence, that Vaughan Chief Justice was of a different opinion from that which the court has now delivered; but the weight of this authority, will be greatly weakened, when it is observed, that it was upon a motion without much consideration; that another judge of the court declared himself of a contrary judgment, and the other two declared no opinion at all on this question, so that it comes only to the opinion of a single judge against another, and all this upon a point not properly in the cause; for it did not appear by the proceedings in the spiritual court, that there was a presentment by the curate, and the affidavit was irregular, and could not supply it; and the whole court finally held that it was not necessary to shew any presentment at all.

Another judge of the court differing in judgment with Ld. Ch. Just. Vaughan, and the other two declaring no opinion at all on the question, greatly weakens this authority.

Upon stating these authorities, it is easy to decide which preponderates; as to that extraordinary anomalous case of *Bird* and *Smith* in Chancery, I think no stress is to be laid upon it, and then there remains only the opinion of Lord Chief Justice Vaughan, against which I oppose the opinions of *Newton*, *Coke*, *Tyrell*, *Holt* and *King*, and the answer of all the judges in the Star-chamber, which carries in it a plain implication of the ground we now go upon.

The opinions of *Newton*, *Coke*, *Tyrell*, *Holt* and *King*, and the answer of the judges in the star chamber, must preponderate against the single opinion of Vaughan.

The second general question made at the bar was, admitting that the lay persons cannot be punished for a clandestine mar-

Second question. The spiritual court has a

jurisdiction by the ancient canon law in the case of a clandestine marriage.

riage

riage by virtue of the canons of 1603, whether the spiritual court had jurisdiction of such a cause against them by the ancient canon law received and allowed within the realm of *England*; and we are all of opinion that the spiritual court had such a jurisdiction.

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I have had occasion already to mention the rule laid down by my Lord *Coke* in *Carwrie's* case, that such canons and constitutions ecclesiastical, as have been allowed by general consent and custom within the realm, and are not contrary or repugnant to the laws, statutes and customs thereof, nor to the damage or hurt of the King's prerogative, are still in force within this realm, as the King's ecclesiastical laws of the same; this rule is warranted not only by the reason and nature of the thing, but also by a strong express declaration of parliament in the preamble to the statute of 25 *H. 8. ch. 21.* concerning Perempence, and dispensations; and though in the proviso at the end of the statute 25 *H. 8. 19.* for continuing the ancient canon law, until the intended reformation thereof should be completed, no mention is made of custom or usage, yet there are words of the same import; and in the act 35 *H. 8. ch. 16.* for prolonging that power during that King's life, the proviso for continuing the ancient canons is repeated and more clearly penned thus, "Such canons, constitutions, &c. as be accustomed and used " here."

Lord *Hale*, in a manuscript treatise, lays it down that external discipline of the church could not bind any man to submit to it, but either by force of the supreme civil power where the governors received it, or by the voluntary submission of the particular persons who did receive it.

Here rests the sure foundation of all ecclesiastical jurisdiction in this kingdom; and of this a rational and natural account is given in a manuscript treatise of that great and learned Judge Lord Chief Justice *Hale*, which I have perused: "I conceive," says he, that when Christianity was first introduced into this island, it came not in without some form of external ecclesiastical discipline (or coercion) though at first it entered into the world without it; but that external discipline could not bind any man to submit to it, but either by force of the supreme civil power, where the governors received it, or by the voluntary submission of the particular persons that did receive it; if the former, then it was the civil power of this kingdom which gave that form of ecclesiastical discipline its life; if the latter, it was but a voluntary pact or submission, which could not give it power longer than the party submitting pleased, and then the King allowed, connived at, and not prohibited it, and thus by degrees, says my author, introduced a custom, whereby it came equal to other customs or civil usages."

It remains then to be inquired, whether that part of the canon law which prohibits clandestine marriages, hath been received and allowed in *England*.

The canons of the council of *Lateran* in the decretals, *l. 4. tit. 3. ch. 3. cum inhibitis*, which contain a general prohibition against clandestine marriages, and require publication of banns by the minister in the church, were adopted into the canons of the church of *England* by the convocation held at *London* 3 *E. 3.* which was in the year of our Lord 1328. *Lynwood, lib. 4. tit. 3. d.*

3. *de clandestina dispensatione, cap. Quia ex contractibus*, says, It inflicts the punishment of suspension on the clergyman for three years, offending by celebrating a clandestine marriage; and then adds, *Et hujusmodi contrahentes pœna debita percellendo*; *Lynwood* in his gloss on the words *pœna debita*, explains them thus: *Erit arbitraria cum non exprimitur. Hodie vero sic contrahentes (ut aliqui volunt) sunt ipso facto excommunicati*: so that he took it that the contracting parties marrying clandestinely were liable to the punishment of excommunication.

That the jurisdiction of proceeding by ecclesiastical censures against lay persons marrying clandestinely, has been received, used, and allowed in *England*, was said, by *Dr. Andrews* in his argument to appear by many entries in the registry of the see of *Canterbury*, some whereof he cited particularly; and it must be admitted, that a long course of such precedents would be of great weight in a case of this nature, though a few instances would not, because they might pass *sub silentio*, and the parties might chuse to submit, rather than undergo the expence and clamour of a suit for a prohibition.

It is therefore more material, that this jurisdiction hath received the sanction of a judgment of this court in the case of *Mattingley versus Martins, Pasc. 8. Ca. 1. Jones 257*. That case was upon a demurrer in prohibition to a suit in the court of the archdeacon of *Berks*, against a husband and wife for a clandestine marriage, had without banns or licence. Upon argument, *Whitlock* and *Croke* were of opinion that the prohibition ought to stand; but *Richardson* Chief Justice, and *Sir William Jones* were of a contrary opinion, that the prohibition ought not to stand: the court being thus divided, they desired the advice and assistance of *Heath*, Chief Justice of the Common Pleas, *Davenport* Chief Baron, *Denham* and *Hutton*, who all agreed with *Richardson* and *Jones*, that there ought to be a consultation; and the second point mentioned in the book to have been expressly resolved was, "That if any person marry without publication of banns, or licence, dispensing with it, they are citable for it into the ecclesiastical court, and no prohibition lies," and a consultation was awarded.

This resolution is in point, and I can find no authority against it; it is also supported by the stronger reason, because though clandestine marriages have always been complained of as a great grievance, and highly detrimental to the publick and private families, yet lay persons contracting such marriages, must, without such a jurisdiction in the spiritual court, have been absolutely unpunished, until the late statute of *W. 3. cap. 35.* was made; which is not to be believed.

But that statute gives rise to the third general question in this cause, which is, whether this jurisdiction of the spiritual court is taken away by the construction and operation of the statute 7 & 8 *W. 3. c. 35. s. 4.* which inflicts a penalty of 10*l.* for this offence, to be recovered in the King's court: the words are these, "And for the better ascertaining, levying and collecting

tion to take away the ecclesiastical jurisdiction as to the husbands and wives clandestinely married.

If there were a long course of precedents of a proceeding by ecclesiastical censures against lay persons marrying clandestinely, it would be of great weight in a case of this nature, though a few instances would not.

In *Mattingley and Martins, Jo. 257.* it was resolved, that if any person marry without publication of banns or licence, they are citable for it into the ecclesiastical court, and no prohibition lies.

Otherwise lay persons contracting such marriages would, without such a jurisdiction in the spiritual court, have been unpunished, till the statute of *W. 3.* was made.

[671]

Third general question. The court unanimously of opinion that the statute of 7 & 8 *W. 3.* hath no operation to take away the ecclesiastical jurisdiction as to the husbands and wives clandestinely married.

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“ the said duties on marriages and licences as aforesaid, be it further enacted, that from and after the 24th of *June* 1696, every man so married without licence or publication of banns as aforesaid, shall forfeit the sum of 10 *l.* to be recovered with costs of suit in manner as aforesaid, by any person who shall inform or sue for the same.”

Before I consider the effect and consequence of this statute upon the main question, I would make two observations upon it; First, That though some doubt was made by Mr. Serjeant *Wynne* upon the second argument, whether this clause in the statute be now in force, yet, upon looking into the series of statutes relating to stamp duties, it clearly appears to be so; for by the act of 8 & 9 *W. 3. ch. 19.* it was continued till the 1st of *August* 1706, and by the act 5 *An. ch. 19. s. 3.* it was further continued for the term of 96 years, therefore that objection must be laid out of the case.

Secondly, That this penalty of 10 *l.* is inflicted only upon the husband, “ Every man so married shall forfeit it;” so that supposing the ecclesiastical jurisdiction to be taken away by implication in this case, it could only be as to the man, and then the prohibition could only stand *quoad* him, and a consultation must go as to the proceedings against the wife.

But upon a mature deliberation we are all of opinion that this statute hath no operation to take away the ecclesiastical jurisdiction as to the husband clandestinely married.

The general question is, whether an act of parliament inflicting a pecuniary penalty or other temporal punishment, upon an offence of which the spiritual court had a prior jurisdiction, without a special saving thereof, doth not take away such jurisdiction, hath been much agitated, and undergone diversity of opinions.

In the case of *Grove versus Elliott*, 2 *Ventris* 41. cited to another purpose, the whole court of Common Pleas held that the spiritual court might proceed against a person for keeping a conventicle, notwithstanding the statute of *Charles* the Second against conventicles: So in the case of *Cory* against *Pepper* in 2 *Levinz* 222. and Sir *Thomas Jones* 131. for teaching school without licence.

[672] But notwithstanding this, there are many opinions in the books to the contrary; and the case of *Chadwicke* versus *Hugles*, *Carth.* 464. is a later case, and is directly opposite to the resolution of *Cory* versus *Pepper* in the instance of teaching school without licence.

The case of *Burdett* versus *Matthews* in the first year of *Q. Anne* was subsequent to them all, and then it was thought a point of such difficulty as to be solemnly argued, but by reason of the death of one of the parties it was never determined.

It must be admitted that where the ecclesiastical censure and temporal punishment are both levied against the same offence, the rule of *Nemo bis puniri debet pro eodem delicto*, is strong against allowing a double proceeding.

offence,

offence, the rule of *Nemo bis puniri debet pro eodem delicto*, is a strong objection against allowing such a double proceeding, for how could a sentence in the ecclesiastical court be pleaded by way of *autrefois convict* to an action or information upon the statute.

But we hold the case now in judgment to be a kind of middle case, plainly distinguishable from any of the former in the material ground of the point now under consideration.

In the case of teaching school without licence, the pecuniary penalty enacted by the statute 13 Car. 2. of uniformity, is inflicted directly and *eo nomine* for a punishment of the same offence, and in the same respect for which the spiritual judge inflicts the punishment of excommunication; the intent of the temporal punishment is to prevent the supposed mischief of unlicensed persons teaching school, and so is the intent of the ecclesiastical censure; and as the penance enjoined is a satisfaction to the publick for that offence, so is the penalty of the statute.

The pecuniary penalty, enacted by the statute 13 Car. 2. in the case of teaching school without licence, is inflicted *eo nomine* for a punishment of the same offence, for which the spiritual judge inflicts excommunication.

But in the case now before us, the penalty of 10 l. on the husband is not inflicted on the offence of a clandestine marriage as such, I mean as a breach of the publick order of the church, and of general inconvenience, and evil example, but collaterally and in a different respect, which is to secure the duties on marriages and licences. The clause is introduced with these express words, "And for the better ascertaining, levying, and collecting the said duties as aforesaid, be it further enacted, &c."

This makes it in reality, and not in fiction only, a proceeding *diverso intuitu ubi eadem causa diversis rationibus ventilatur*, as in the expression of the Stat. de Articulis clerici. 2 Inst. 622.

The ecclesiastical censure is to punish the offence directly *eo intuitu* as it is a clandestine marriage, a crime against the publick order of the church, and of general inconvenience, and of evil* example; the statute inflicts a penalty in respect of another consequence arising from it, as it infers a fraud and diminution of the publick revenue; and this restriction does not arise by construction, but by the express declaration of the legislature themselves.

The statute inflicts a penalty in respect of a clandestine marriage being a fraud on the publick revenue, but the ecclesiastical censure is to punish it as an offence against the publick order of the church.

In this view it seems rather more strong than the common case on the statute 18 Eliz. ch. 3. concerning the punishment of the mothers, and reputed fathers of bastard children.

The statute not only provides for the indemnity of the parish, but also for the punishment of the offence of lewdness; the words are concerning bastards begotten, and born out of lawful matrimony, (an offence against God's law and man's law), the said bastards being now left to be kept at the charge of the parish where they be born, to the great burthen of the said parish, and to the evil example and encouragement of lewd life, it is enacted, that two justices of the peace, upon examination, shall and may by their discretion take order as well for the mother, and reputed father of such bastard child, as also for

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for the better relief of every such parish, and shall and may likewise take order for the keeping of every such bastard child, &c.

The 18 *Eliz.* which concerns the mothers, &c. of bastard children, inflicts a temporal punishment, to prevent undue charges on parishes; the spiritual court punishes it by penance, as it is a publick scandal to the church; and therefore it has never been imagined that the one has repealed the other.

This statute inflicts a temporal punishment upon an act of lewdness, not as such, viz, as a spiritual offence, and mere inconvenience, but to prevent undue charges being brought upon parishes. The spiritual court punishes it by penance and ecclesiastical censures, as it is a crime of incontinence, a spiritual offence, a publick scandal to the church; the statute punishes a consequence arising from it, the having a bastard, as that may infer an unjust burthen upon the parish where it is born; and these punishments being *diverso intuitu*, in these different respects, the one for the criminal act directly, the other on account of a particular evil consequence arising from it, have been suffered to go on hand in hand ever since the making of the statute, and it was never imagined that the one had repealed the other.

By this reasoning, I hope, I have established a substantial diversity between the ground we go upon, in determining this case, and the common argument which hath generally been made use of to support proceedings in the spiritual courts for offences punishable in the temporal courts; that argument is that the former proceed only *pro salute anime* of the offender, but the latter punish him either in body or purse.

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That the spiritual courts proceed only *pro salute anime* of the offender and the temporal punish him either in body or purse, is a distinction in words without a real difference; but in this case it is otherwise where the ecclesiastical censure is for the criminal act, and the temporal penalty for a fraud.

But that is a distinction in words without a real difference, for all punishment is intended for the reformation of the offender, and an example to others; and this is the end both of the ecclesiastical censure, and the temporal penalty, when they* are both inflicted immediately and directly for the same thing; but it is otherwise here, where the ecclesiastical censure is for the criminal act, and the temporal penalty for a fraud, consequently arising from that act; further, there is another ground to support this proceeding in the spiritual court, and to distinguish the case from those which have been above cited. The rubrick prefix to the office of matrimony in the book of common prayer, both those of 2 & 8 *Ed. 6.* and 13 & 14 *Chs. 2.* say first, the banns of all that are to be married together, must be published in the church thrice on several *Sundays* or holy-days in the time of divine service.

By the statutes of 1722, and 13 & 14 *Chs. 2.* the laity are bound by the rubrick against marrying without publication of banns, and by the first act are expressly punishable by the censures of the church; and by the second act the power of the ordinary is directed to be continued and applied for punishing the like offence against the rubrick of the present book of common prayer.

This provision is confirmed by the several acts of uniformity of these Kings, and by reference is expressly made part of the respective acts. The act of uniformity, 1 *Eliz. ch. 2.* re-enacts the book of common prayer, *E. 6.* without any alteration in this particular, and has this clause, *section 16.* "Be it further enacted,

that

“that all and singular the said arch-bishops and bishops, and
“all other their officers exercising ecclesiastical jurisdiction,
“as well in places exempt as not exempt within their dioceses,
“shall have full power and authority by this act to reform, cor-
“rect and punish, by censures of the church, all and singular
“persons which shall offend within any of their jurisdictions or
“dioceses against this act, and statute; any other law, statute,
“privilege, liberty or provision heretofore made, had or suffered
“to the contrary notwithstanding.” The act of uniformity 13
& 14 Car. 2. ch. 4. *section* 24. runs thus, “And be it further
“enacted, that the several good laws and statutes of this realm
“which have been formerly made, and are now in force for the
“uniformity of prayer, and administration of the sacrament
“within this realm of *England*, and places aforesaid, shall stand
“in full force and strength, to all intents and purposes whatso-
“ever, for the establishing and confirming the said book of com-
“mon prayer, &c. herein before mentioned, to be joined and
“annexed to this act, and shall be applied, practised and put in
“use, for the punishing all offences contrary to the said laws,
“with relation to the book aforesaid, and no other,” the conse-
“quences following from these clauses seem to be, *First*, that
the laity are bound by the rubrick against marrying without
publication of banns; *Secondly*, That by the express words of the
act of uniformity, 1 Eliz. they were punishable by the censures
of the church for acting contrary to it. *Thirdly*, That by the act
of uniformity 13 & 14. Car. 2. this power of the ordinary is con-
tinued, and directed to be applied and practised for punishing
the like offence against the rubrick of the present book of common
prayer.

Hereupon a new question arises, supposing that the enacting
this pecuniary penalty by the Stat. 7 & 8 W. 3. c. 35. might by
implication have taken away, or repealed any authority which
the spiritual court had originally in this matter by force of the
canon law, whether it shall operate to take away a jurisdiction
expressly given to it by a former act of parliament, and conse-
quently *pro tanto* to repeal that act of parliament.

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The rule touching the repeal of laws, is *leges posteriores pri-
ores contrarias abrogant*: but subsequent acts of parliament in the
affirmative giving new penalties, and instituting new methods of pro-
ceeding, do not repeal former methods and penalties of pro-
ceeding, ordained by preceding acts of parliament, without neg-
ative words; and as in 7 & 8 W. 3. ch. 35. there are no neg-
ative words, both may stand together, and either the one or the
other may be put in execution.

Subsequent acts
of parliament in
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nalties, do not
repeal former
ordained by pre-
ceding acts
without negative
words.

Besides, a later act of parliament hath never been construed
to repeal a prior act, without words of repeal, unless there be a
contrariety and repugnancy between them, or at least some no-
tice taken of the former law in the subsequent one, so as to in-
dicate an intention in the law-makers to repeal it.

In the act of King *William* no sort of notice is taken of the act
of uniformity, but the provision declared to be for a different pur-
pose, the securing a particular duty or revenue to the crown.

I have now gone through the reasons upon which the court founds its judgment, and in doing it I have been the more large and particular, in order to prevent any mistakes about the ground of our opinion.

Clandestine marriages are a growing evil, and therefore the court would not weaken any method by which they may be restrained.

The prohibition to stand as to the proceeding only for the plaintiff's being married at an uncanonical hour, and a consultation awarded as to the residue of the cause.

The evil of clandestine marriages, is one of the growing evils of the times, productive of many calamities in families, and of great mischief and disorder in the community, and therefore we thought it our duty not to weaken any lawful method by which it may be restrained and punished.

The judgment must be, that the prohibition stand as to proceeding only for the plaintiff's being married at an uncanonical hour (*i. e.*) not between the hours of 8 and 12 in the forenoon, that circumstance having been, as far as appears to us, introduced by the canons of 1603, and that a consultation be awarded as to the residue of the cause.

This learned and celebrated argument was made by Lord *Hardwicke*, in delivering the opinion of the whole court of King's Bench, when he was Chief Justice, and Sir *Francis Page*, Sir *Edmund Probyn* Knights ; and *William Lee*, Esquire, Justices.

T A B L E

O F

The Principal Matters.

Account.

See Decree, Master in Chancery,
Master's Report.

WHEN there is a plea of a stated account, to a bill brought for a general one, the plaintiff must amend; but pays only the costs of the day. Page 1

A bill may be brought for errors in an account, though it has been settled for three or four years. 113

Where fraud appeared in a stated account, the whole decreed to be opened, though it was a stated account of 23 years standing. 119

The House of Lords, very often, in matters of account which are intricate, refer it to two merchants named by the parties, to consider the case, and report their opinions upon it, rather than leave it to a jury. 144

Where persons have mutual dealings, signing the account is not necessary to make it a stated one, but it is keeping it any length of time, without making an objection, which binds the person to whom it is sent, and prevents his entering into an open account afterwards. 252

The delivering up vouchers is an affirmation that the account between the parties is a stated one; but it is not absolutely necessary they should be delivered up at the time the account is settled. ibid.

Bankers keep the drafts which are made upon them on files, because they are vouchers, and of use in clearing up disputes between their shop and a third person. Page 252

If a defendant by his answer acknowledges any particular sum due, though he swears those sums were discharged, yet it is still a ground for directing an account. 254

A plea of a stated account is bad, unless it shews the account was in writing, and what the balance was. 399

When at law a person in an account is allowed sums under 40s. on his oath, he must swear positively, and not to his belief only: the same directions as to this matter are given under a decree in this court, that he must peremptorily swear to the fact. 410

The case of *Sturt and Melliss* being very much entangled, and the transactions of long standing, the court chose rather to dismiss the bill, and leave the plaintiff to his action at law, than direct an account before the Master. 610

Acquiescence.

Where a man, conscious of his right, suffers another to build on his ground, without setting up a right till afterwards, the court will oblige the owner to permit the person building to enjoy it quietly. 83

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Where there is a second suit between the same parties, you may insist on an acquiescence under a decree in the first, unless the bill be dismissed without any prejudice to the question in that cause. Page 354

Acquiescence. See **Fraud and Acquiescence.**

Where the motives to an action are unjust, though the cause of action was just, a court of equity will always take this into consideration, though they cannot at law pay any regard to it.

Where a person has a sole exclusive right, which is infringed upon, if an action of trespass will not lie, he may have an action of the case; for the law will not permit a man, who has a right, to be without remedy. 392

Ademption. See **Legacy, Satisfaction.**

Where after making a will a father advances a child with a portion as great, or greater than the legacy, such provision has always been held an ademption; but when the devise has been of a residue, no instance where a subsequent portion has been held to be an ademption. 215

J. makes a will the 4th of May 1738, soon after *S.* makes his address to the plaintiff; and in *July* applied to *J.* her great uncle, for his approbation, who agreed to give *S.* 500*l.* and drew a note payable to him on the 25th of *March* 1739, and lodges it in *H.*'s hands to be delivered to *S.* after the marriage was had, and said he would leave the plaintiff something by will, but would not be obliged to do it; on the 19th of *August* 1738, *J.* dies; and the next day the plaintiff and *S.* were married. Lord *Hardwicke* held, the legacy of 1000*l.* given under *J.*'s will to the plaintiff, was not satisfied by the 500*l.* given upon the marriage in the testator's life-time. 516

Where a father gives a legacy generally under a will to a daughter, he must be understood to mean it as a portion; and if he afterwards gives her a sum on marriage, it is an ademption of his legacy. 2

Double portions are what this court strongly leans against; and whether the portion given in the life-time be less or not, is no ways material, where an orphan is under the care of a collateral relation, and he by will gives her a legacy, which is expressed to be for her portion, and afterwards provides for her in his life-time; Lord *Hardwicke* was inclined to think, this would be an ademption. Page 518

In the cases of satisfaction of legacies, parol declarations have always been admitted. *ibid.*

Where a father gives a daughter 500*l.* as a portion in marriage, and says, I will leave her something by my will, but will not oblige myself to do it, this would not be an ademption. 519

The altering of a will as to one niece, can never be taken as an evidence, of the testator's intention to alter the legacy as to another. *ibid.*

A father administrator *durante minore* state of his daughter, who was executrix and residuary legatee of her grandmother's estate, agreed when she married the plaintiff, that he should have 800*l.* which in the settlement is called a *portion*: Lord *Hardwicke* refused to decree an account of the grandmother's personal estate, as she had been dead 20 years; but directed the father's representative should account for his personal estate as to the 800*l.* only, and interest at 4*l.* per cent. from the marriage. 521

Administration and Administrator. See **Executor, Spiritual Court, Marshalling of Assets, &c. Next of Kin.**

An administrator is not in every case chargeable with interest on account of personal estate. 151

It is not an invariable rule, that an administrator should be allowed costs at all events. *ibid.*

The court had decreed an account against *C.* of the assets of her husband as his administratrix after his death; she took all his goods and stock in trade, and carried on the same business: The Master reported 1400*l.* due to the plaintiffs upon the balance of account, who insisted on interest for that sum: Lord

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Lord Hardwicke held, that this being a demand on simple contract, and the administratrix not having yet sold the goods, her only fund for raising money, she shall not be charged with interest on the 1400 l.

Page 439

Affidavit. See **Master's Report**, and **Oath**.

Wying and revying in affidavits, not allowable. 14

The not swearing expressly to words spoken, but adding to that effect, is a proper caution in an affidavit. 60

Age. See **Infant**.

Agreement. See **Purchase**, **Infant**, **Lease**, **Covenant**, **Statutes of Champerty**, **Articles**.

The court of chancery, in carrying agreements in execution, govern themselves by a moral not a mathematical certainty. 20

Where a part of the agreement is performed on one side, it is but common justice it should be carried into execution on the other. 100

It is not only contrary to the statute of frauds, but to the common law before the statute, to add any thing to an agreement in writing by parol evidence. 383

If parties are entering into an agreement, and the will out of which the forfeiture arose was lying before them, and their counsel, while the drafts were preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point. 591

After an agreement has intirely settled all disputes between parties and their several rights, the hands of the court are so tied up, they will not enter into a question which might have been started, had there been no such agreement. 592

Agreement Parol. See **Statute of Frauds and Perjuries**, **Agreement**.

Agreement under Hand. See more under **Marriage Brokers Bonds**.

Agreement, when to be performed in Specie, and when not.

J. D. who died intestate, left three sisters; his personal estate being agreed to be divided into thirds, two mortgages, one in fee, the other for a term, each for 150 l. were allotted to the defendant, one of the sisters; before any assignment, her husband borrowed 200 l. of the plaintiff upon note, and as a further security, left the two mortgages with him, and gave his note, promising to assign them, and then dies. Bill brought against his administrator, and against the mortgagors, to be paid principal and interest, or to foreclose. Lord Hardwicke held, that the husband's promise to procure an assignment of the mortgages, amounted in equity to a disposition of them pro tanto, so as to satisfy the plaintiff's debt, which being done, they belong to the wife as her chose in actions.

Page 207

A proviso in articles for the purchase of an estate, that if either should break the agreement, he should pay 100 l. to the other; the defendant, on being offered two years purchase more, accepted it, notwithstanding his agreement. *Lord Hardwicke decreed a specific performance of the articles.* 371

The offering to pay the stipulated sum will not vacate the agreement, for it is no more than the common case of a penalty. *ibid.*

A penalty has never been held to release parties from their agreement, for tho' incurred, they must perform it notwithstanding. *ibid.*

Agreement on Marriage. See **Settlement after Marriage**.

As to settlements made after marriage in pursuance, of articles previous thereto, *vide* 39, 40, 73

A limitation under marriage articles to A. the intended husband for life, remainder to the issue of their two bodies, will not entitle him to dispose of the estate, but will be carried into strict settlement in this court. 73

If a settlement be just in general, a particular advantage to one side or the other will not affect it. 521

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S. a taylor by trade, and possessed of a real estate of 14*l. per ann.* in 1730 made his addressees to *W.* then 26 years of age, and whose father it was thought would give her 500*l.* to her fortune: On the courtship coming to his knowledge, he declared his dislike of the match, and forbid *W.* giving S. any encouragement; the courtship being carried on notwithstanding, in *January 1732*, S. met *W.* in a market-town, and there, in an ale-house, bonds were executed, to which two strangers were witnesses, and the only persons present; one from *W.* in the penalty of 600*l.* conditioned, that if she did, on or before the expiration of 13 months after her father's death, marry S. or if she shall not, nor will not marry S. but marry some other person, then she shall pay to S. 500*l.* at or immediately after failure of such marriage, or else the obligation to remain in full force. Another bond from S. the same *mutatis mutandis*, with that from *W.* with a covenant in it, that if he shall not, or will not marry *W.* but marries some other woman, to forfeit and yield up to *W.* for her own use, all his estate, real and personal. One of the witnesses to the bonds swore they were read over before execution, the other, that they were not; one that they were exchanged, the other, that they both remained in the custody of S. In 1736, the father of *W.* died, who left her 340*l.* the 13 months expired, and then *W.* filed her original bill to be relieved against her bond, and dying soon after, her administrator revived the cause; and S. brought a cross bill for satisfaction out of *W.*'s affairs. Page 535

Though a parent has no power to prevent the marriage of his child, yet his consent is expected, and by the laws of some countries necessary. 540

Lord Hardwicke compared it to the cases of bonds given before marriage, to return a part of the portion, where the fraud was not between the contracting parties, but on the parents of one of them, who being deceived in this respect, it has induced the court to set aside such bonds. ibid

Lord Hardwicke doubted whether a breach of the condition could have been assigned without S.'s shewing a tender

of himself by writing, or sending, and thought his assent must have been an actual proposal, and the first act. Page 541

When the deeds, previous to the marriage of the plaintiff with *John Tyrrell*, were reading over to her, she observed there was a mistake, for that the moiety of the estate of which her mother was seized, was limited to his use for life, and not to her separate use after her mother's death, as had been agreed, and refused to execute unless the mistake was rectified; in order to do this, by the desire of the trustees, he gave a note under his hand, whereby he agreed with the plaintiff, that she should enjoy and receive the profits of one moiety of the estate, after the decease of her mother: The marriage was had shortly after; and in *July 1739*, the mother died; and in *July 1740*, *Tyrrell* became a bankrupt; and the assignees being in possession of the rents of this moiety, refused to let the plaintiff receive them, or to make any settlement for securing the receipt thereof to her pursuant to the agreement before the marriage. The Master of the Rolls of opinion that a note under the hand of the husband ought to be looked upon as part of the settlement, and as the wife would have been relieved if she had brought a bill against the husband, equally so, as brought against the assignees who stand in his place. 558

Parol evidence cannot be admitted to explain the agreement between the parties; but as to the occasion of signing the note it may. 560

A settlement will control a writing executed after; but the parties refusing to execute the settlement without it, they must be construed as one entire agreement, and both consistent. ibid

Though the words *separate use* are not in the note, the words *enjoy the profits* imply it. 561

Alien.

In the plea of an alien, you must aver the person was an alien, or otherwise it is no bar. 397

An alien may take by purchase, but then it is for the benefit of the crown. 398

There

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There is no instance where it has been held that a person by marrying an alien woman is seised of the estate purchased by her. Page 398

Annual Rents.

The court direct *annual rents* in an account of the rents of real, but not of personal estate. 410

A mortgagee by entering into possession, by his own act makes himself accountable; and it is in this case the direction of annual rents is given. *ibid.*

Annuity. See **Statute of Limitations.**

An annuity granted by the Duke of *Whar-ton* to Dr. *Young*, in consideration that the publick good is advanced by the encouragement of learning, and in consideration likewise of the love he bore to him; this is not a legal consideration, nor does it amount to a valuable one in the eye of the law. 152

Giving up a pecuniary advantage at the time an annuity is granted, amounts to a valuable consideration, as much as a sum of money paid down at the time. 154

There being arrears due on the first annuity, the promising not to sue for them was a good consideration, and from that time it ceased to be a voluntary grant. *ibid.*

In respect to arrears of an annuity, there is no certain rule of giving interest; the most frequent instances are, where it was the bread of the wife or child. 211

The court gave interest on the arrears of an annuity from the time a Master's report was confirmed, which was 28 years, in favour of the representative of the annuitant only. *ibid.*

A junctim annuity decreed to be redeemed on clearing the arrears, and paying the whole principal sum advanced, and interest to the time only, the plaintiff having offered to redeem. 231

After the register had drawn up the minutes, Lord *Hardwicke* declared he had, a great aversion to these contracts, and that he would have decreed a redemption *ab initio*, if it could have been done consistent with the rules of equity. 235

A devise to trustees of a sum of money, to be laid out in the purchase of an annuity clear for *A*, means free from taxes. Page 376

Where an annuitant has entred, and is in possession of the estate charged with it, the court will not oblige him to quit the possession, till the grantor allows him interest for the arrears of his annuity. 411

Answer. See **Courts of Law, Evidence, Costs, Defendant, Infant, Plea.**

Taking exceptions to an insufficient answer, is tantamount to a demurrer at law upon an insufficient plea. 24

The case of *Hawkins* versus *Crooke*, before Lord Chancellor *King*, 4 *Geo.* 2. was not determined upon satisfactory reasons, for receiving costs upon a Mailer's reporting an answer insufficient, is by no means accepting it for an answer. *ibid.*

Lord *Hardwicke* inclined to think, that where there is an amended bill, and an answer put in to it, the plaintiff is intitled to a decree *pro confesso*, abstracted from any proceedings in the original cause. 25

As well on commissions to take answers and pleas in the country, as before the Masters in chancery, the commissioners shall see the defendants sign their answers or pleas for the future. 289

A defendant was allowed to amend his answer by adding a new fact. 294

Where a plaintiff is charged by an answer, he must discharge himself by proof, and cannot do it by reading the whole answer as he may at law. 383

Lord *Hardwicke* doubted, whether an infant can, before he comes of age, put in a new answer, so as to rehear the cause over again; for if there should be a decree against him on the second hearing he may, with as much reason, put in a third answer, which would occasion infinite vexation. 487

Appeals.

On an appeal from the *Rolls*, the appellant may be let into new evidence, S s 4 which

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which was not read there, provided he will give up his deposit. Page 408

Articles. See Agreement.

The articles, and the indenture of release, in this case, must be considered as one and the same act, being both dated on one and the same day, and a different construction ought not to be put upon them. 457

Articles are considered in this court as minutes only, which the settlement may afterwards explain more at large. 545

There is no difference between articles unexecuted *in toto*, or in part only; for all the cases go upon this ground, that what is covenanted to be done, is considered as done. *ibid.*

Assets. See Executor, Party, Decent, Bond.

Admission of assets by an executor to one legatee, is an admission to all. 3

It is not a general rule, that any person who has assets may be made a defendant; to constitute such a person a necessary party, the plaintiff must shew he either denies he has any assets, or applies them improperly. 33

The court never esteem it an ingredient to take the assets out of the hands of an executor, that he is not of affluent fortune, so long as the testator himself has placed this confidence in him, without regarding his circumstances. 125

A son and a daughter by one venter, a son by the second, the father dies indebted, the son by the first enters, is seised, and dies; the daughter is intitled, being a *possissa fratris*, and is liable to her father's debt. 206

It is an inaccurate expression, to say, a reversion after an estate-tail is not assets, for there is a liability which makes it assets *in futuro*. *ibid.*

After assets are discovered, by a bill brought in this court, the plaintiff shall not be turned over to law, but decreed a satisfaction here. 363

The court will not charge interest upon an executor, who makes use of assets come to his hands, in the way of his trade. 603

Assets marshalled, and in what order debts are to be paid. See *Debt, Creditor, Heir*, under *Matters controverted between the Heir and Executor, &c. Devise, Devisee, Specific Legacies.*

A devise of an estate charged with the payment of debts to a collateral relation, being a devise to a stranger, the descent is broke, and it is equitable assets. Page 293

Where a mere trust-estate descends upon an heir at law, it will be considered as legal, and not as equitable assets. *ibid.*

H. who was seised in fee of an estate, having borrowed money in 1724, gave a bond for it, and a mortgage on it for a security afterwards: in 1728, by will he devises the mortgaged estate, and a freehold for three lives to his wife, and appointed her sole executrix; in 1734 he purchased one moiety of the reversion in fee of the life-hold estate, and the other moiety in 1737, and died without altering his will; the question was, if the personal estate is not sufficient to pay the mortgage, whether the estate descended on the plaintiff should not make up the deficiency, so that the estate devised to the wife might not be affected whilst there were real assets, Lord Hardwicke held at the first hearing, the wife was not intitled to such exoneration in a court of equity, but *not* take the estate with its burthen. 424

On the one hand it would be hard for an heir at law, out of a small pittance, to pay a debt out of it in favour of a devisee, and on the other hand, where the estate descended is large, it would be hard to leave the burden on the specific devisee when the mortgage almost exhausts the estate: on account of these difficulties Lord Hardwicke adjourned the case to search for entries of judgments at law on the statute of fraudulent devises, and for precedents in equity, where there are specialty debts and mortgaged estates devised besides. 427

Lord Hardwicke was of opinion that the wife is intitled to have the mortgage upon the estate devised to her exonerated out of the real assets descended upon the heir, and reversed the former decree totally as to this point. 430

Where

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Where a will sets out with a desire that the debts may be paid in the first place, the wife with respect to creditors must have taken the estate *cum onere* devised to her, but is not sufficient to fix the burden upon the legatee so as to make a variation with regard to the different funds out of which the debts are to be paid; or transpose the order in which they are to be applied for that purpose.

Page 431

To lessen the estate which remains to the wife under the will, where the intention of the testator was totally to disinherit the heir, would found harsh in a court of equity. *ibid.*

It is the rule in equity, that personal assets must be first applied to satisfy a specialty debt, and if deficient, the heir shall be charged for the real assets descended. 434

In *Pitt versus Raymond*, the bill was to have satisfaction out of the assets descended and devised: Lord Talbot directed, if the personal were not sufficient, an account was to be taken of assets descended, and if these were deficient, then of the devised estate, which shews his opinion as to the order in which the assets were to be marshalled.

ibid

The land in the case of *Galton and Mack* is given to the wife, which must mean effectually, for if subject to the mortgage, it is an ineffectual devise.

436

The election of the creditor to come for satisfaction either against the real or personal estate will not determine what shall ultimately be the fund which shall be charged. 438

The rule in marshalling of assets is of such consequence to the practice of this court, that it ought to countervail any arguments of hardship to particular persons. 439

Assets by descent and in the hands of the heir. See Mortgage, Executor.

A man cannot by any form of conveyance whatever raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, so as to prevent the reversion from being assets to satisfy the debts.

57

T. D. on his marriage settled his estate on himself for life, on his wife for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tale male, remainder to himself in fee; a son born, the father dies indebted by bond, the son afterwards dies without issue, but by his will devises his estate to the defendant in fee. *Lord Hardwicke held, the reversion being come into possession was assets to pay the father's debts, notwithstanding the devise of the son.* Page 204

Assignment and Assignees. See Leases, Baron and Femic.

As at law an assignee of a term may assign and thereby get rid of his subsequent rent, and the covenants which run with the land, *a fortiori* he may do it in equity. 546

A husband may dispose of a possibility in equity, if assigned for a valuable consideration: but it must be an assignment of that particular thing, and not rest only on intention and construction of words in a covenant. 549

Attachment. See Process.

Attainder.

An inquisition of attainder is only to inform, and does not intitle the crown to any right. 599

Attorney General.

The attorney general of course grants a *noli prosequi* to a criminal prosecution, where an action of trespass will lie. 302

Attorney and Solicitor. See Orders, Deeds, Witness, Bill of Replevy, Master in Chancery.

Japhet Crook in 1728, being under a prosecution for perjury, and forgery, employed the defendant as his attorney to get bail, which he did accordingly, and during this transaction drew *Crook's* will who directed a legacy of 1000*l.* to the defendant, and 500*l.* a piece to the bail, and afterwards the defendant

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dant got a bond for the security of his legacy: *Crook* afterwards revokes this will, and by another appoints the plaintiff executrix, and makes her residuary legatee; after the death of the testator the defendant brings an action on his bond, and has a verdict and judgment; a bill brought to be relieved against it for fraud; *Crook* living six years after giving the bond, and not attempting to be relieved; Lord *Hardwicke* decreed for the defendant on the first hearing, but on the rehearing reversed his former decree being thoroughly convinced it was wrong. Page 25

An attorney ought not to take a bond for services, but if a client, with his eyes open, will give one of his own accord, it is not absolutely void. 26

The statute 2 G. 2. c. 23. having laid down certain rules for regulating the behaviour of attorneys and solicitors, with regard to their clients, they have since that act been considered as officers of justice, and stated fees allotted them which they ought not to exceed. 27

When an attorney is retained to appear, and he does not appear accordingly, the court will punish him for it; and on the other side, an attorney once chosen cannot be changed without the express leave of the court. *ibid.*

From the alliance there is between an attorney and his client, the court will relieve the client against the extortion of an attorney. *ibid.*

Courts of equity will order an attorney's bill to be taxed, though his client has given him a mortgage to secure what was charged to be due to him on account of a law suit. 29

A clerk in court, who lends money to a solicitor to carry on a cause, is not intitled thereby to detain a client's papers as a pledge. 114

By the statute of *H. 8m* 1. c. 29. attorneys and serjeant counters who have acted unbecomingly their profession may be silenced and not allowed to be heard any more in the way of their business. 173

Where a solicitor is guilty of male practices, he may be degraded by having him struck out of the roll of solicitors. *ibid.*

A solicitor having taken a judgment of his client for 400*l.* whilst the cause was depending, and also several extraordinary charges appearing in his bill;

Lord *Hardwicke*, though adjusted and allowed seventeen years ago, referred the bill to be taxed, and ordered the judgment and other securities to be delivered up. Page 295

A solicitor makes an absolute conveyance to himself of 1000*l.* from the plaintiff's wife whilst she was parted from her husband, prepared six weeks before, and not executed till three weeks after she left him, at a lodging the defendant got for her; the considerations expressed in the deed are, *for services done and favours shewn*; the bill was brought to set aside the deed as obtained by fraud, and that it was intended as a conveyance in trust for the daughter of the plaintiff, though the defendant omitted to make any declaration of such trust. Lord *Hardwick* on all the circumstances of this case decreed the deed should stand only as a security for such sum as was justly due to the defendant, and that the surplus must be deemed a trust for the daughter, who being dead, it devolves upon the plaintiff as her representative. 296

If an attorney *pendente lite* prevails on a client to agree to an exorbitant reward, the court will either set it aside entirely, or reduce it to the standard of the fees to which he is properly intitled. 298

Award.

The court of King's Bench was the proper court to examine into the partiality of the arbitrators, as the award was made a rule of court there, which the plaintiff might have done by shewing cause why the rule for an attachment on the non performance of the award should not be made absolute. 135

Where the parties have agreed to make the submission to an award a rule of court, and to be restrained from bringing a bill in equity, the arbitrators, notwithstanding the award may be defective in point of law, may plead it in bar to a bill here. 395

Arbitrators may plead the award in bar to a bill charging partiality, but they must support their plea by shewing themselves impartial, or the court will give a party a remedy by making the pay cois.

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Where a submission to an award has been made a rule of court, it is a contempt of that court to dispute the order, unless they can shew partiality, corruption or misbehaviour in the arbitrators.

Page 396

A plea was put in to a bill brought to set aside an award and for a general account. Lord *Hardwicke* allowed it as against the general account, but held that the plaintiff was not precluded at the hearing from objecting to the award for fraud or partiality in the arbitrators.

501

It is improper to come into this court to set an award aside merely for an objection in point of form.

504

Courts of law formerly used too much nicety in determining awards. *ibid.*

Though arbitrators refer costs to be taxed, yet such reference will not vitiate the award at law. *ibid.*

If courts of equity were to take greater latitude in determining awards than courts of law, it would introduce confusion and uncertainty, and therefore it is better for them to adhere to one rule. *ibid.*

As courts of law have said they will never make a presumption to overturn an award, so neither will a court of equity.

505

Where an award is good to a common intent, and answers the purpose of parties in submitting to a reference, the court will not set it aside upon trivial objections. *ibid.*

If arbitrators delegate their power, the award is totally void. *ibid.*

It is not necessary for arbitrators to chalk out particularly the method in which the award is to be carried into execution. *ibid.*

Where arbitrators have awarded releases, the leaving it to the court to give directions to a master to settle the form does not vitiate an award. *ibid.*

506

One partner brings a bill against another to discover and be relieved against frauds, &c. the defendant pleaded an agreement, that in case any difference should arise between them, it was to be referred; and the matters in the plaintiff's bill relate only to a partnership, and yet have never been submitted to arbitration, nor has he ever proposed a

reference, though the defendant offered and was always ready to do it. Lord *Hardwicke* disallowed the plea; for as it is a bill to discover, and be relieved against frauds, the arbitrators cannot examine on oath, which, by the agreement, they should have had a power of doing. P. 569

See note 1.

Bargains Catching. See Infant, &c.

SIR J. B. remainder in tail in the estate in question, being distressed, conveyed two manors, of the yearly value of 300*l.* expectant on an estate for life in his uncle Sir *Samuel Barnardiston*, for the sum of 300*l.* to the defendant, his heirs and assigns, from and after the decease of Sir *Samuel Barnardiston*, without issue male. *133*

Sir J. B. brought a bill to be relieved against this bargain, as unconscionable. Lord *Hardwicke* held it a void conveyance, even in point of law; for as the plaintiff had a remainder in tail only, he could but convey such estate as he had, and not dispose of the inheritance. *ibid.*

A person who conveys an estate-tail, conveys *totum statum suum*, which is an estate for life; and as the deed in this case only carries an estate for life, it is not such an estate as the parties contracted for, and therefore void. *134*

A judgment of 6000*l.* being taken at the time of the purchase, as a security for the performance, Lord *Hardwicke* directed it should stand only as a security for principal, interest, and costs, and no further. *ibid.*

There are all the material ingredients in this case, as in those which have been cited to set aside this agreement as a catching bargain against a necessitous heir. *135*

What guides the court in all these cases, is the taking the advantage of an heir's being distressed, and is the principal ground of these decrees. *ibid.*

The court have always extended their relief in such cases, for the sake of the publick, to prevent people's gaming to the prejudice of improvident persons, and the ruin of families: Cocks decreed to Sir *John Barnardiston*. *135*

If a person will enter into a hard bargain with his eyes open, a court of equity will

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will not relieve him upon this footing only. Page 251

Bargain and Sale.

An equity of redemption may be conveyed by bargain and sale. 15

Baron and Feme. See *Depositions, Assignment, Money, Mistakes, Power, Will, Letters, Agreement, when to be performed in Specie or not, Bankrupt, Power, Debit, Redemption and Foreclosure, Creditors, Bonds, Portion, Spiritual Court, Marriage.*

A wife, who cannot in conscience consent to such an answer as is drawn up by the husband, will be allowed to answer distinct from him. 50

Where a husband, by menaces, prevails on a wife to put in an answer, he may be punished for a contempt. *ibid.*

A criminal conversation against a husband cannot, in a civil suit, be read in evidence against a wife, as it would tend to make her incur a forfeiture of her portion, especially if she is an infant. 64

A wife may as well dispose of personal estate, over which she has an absolute controul, as she can dispose of real estate by joining in a fine with her husband; and, on her consent in court her fortune was directed to be paid to the husband, though he appeared to be an insolvent person. 67. See note to this case.

A father by deed creates a trust of a real estate, for the benefit of his daughters, and directs the rents to be paid them, whether sole or covert, for their separate use; they marry, and join with their husbands in bonds, for money lent to their husbands; the trustees under the father's deed ordered to pay the rents and profits of the trust estate to the bond creditors. 68

Though a husband has imposed on a wife, by giving her a bond void at law, yet this court will establish the agreement according to the intencion of the parties. 97

This court will not allow a wife maintenance, where there is full proof of her elopement and adultery. *ibid.*

The husband having possessed himself of the greatest part of the wife's fortune, and left the kingdom, the interest arising from trust money was directed to be paid to the wife till the husband thinks proper to return, and maintain her as he ought. *P. 98, see note thereto.*

P. gives a third of a moiety of the residue of his personal estate to S. P. who marries, and whilst out of the kingdom, assigned together with her husband the third of a moiety which was to arise out of P.'s estate, in trust for their daughter, provided they died before they came to England. S. P.'s first husband died, and she afterwards married a second, who survived her: if she had continued a widow, she would have been intitled to a decree for this third, and no notice would have been taken of the daughter's interest. 180

A husband cannot sue for a wife's *cause in action* till he has administered. *ibid.*

If a bond be given to a *feme sole*, who marries afterwards, the husband and wife must join in the action; otherwise, if made to the wife after marriage, the husband alone may bring the action and recover. 203

A husband may assign the trust of a wife's term, unless it be a trust from himself for the wife's benefit; so likewise he may dispose of her mortgage in fee, as well as her mortgage for a term. *ib.*

A husband may assign a wife's possibility, if it be for a valuable consideration, and he may release her bond without receiving any part of the money. *ibid.*

A promise during coverture does not bind a wife; but if repeated after the husband's death, it is a confirmation. 245

Coverture is no excuse for not redeeming a mortgage, for if a woman becomes afterwards discover, the statute of limitations will run from that time. 333

A *feme covert*, who had a separate estate, employed workmen in her husband's house, without his direction, and promised to pay them; the Master of the *Rolls* doubted, whether a parol promise can subject lands, but she submitting to pay, he decreed accordingly. 379

A husband has a mortgage upon his estate, the wife joins with him in charging her own, if she survives, her estate shall be looked on only as a pledge, and she is intitled to be satisfied out of his estate.

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estate, as standing in a mortgagee's place. Page 384

Where the husband assigns the wife's trust of a term for a valuable consideration, the assignee need not make a provision for the wife before he could be intitled. 421

As at law the husband could dispose of a term for years, so he may dispose of the trust of a term, for the same rule of property must prevail in equity as well as at law. ibid.

This differs from the other cases, for the husband at once assigned all the fortune, and which he could not reduce into possession without the assistance of this court. 422

The material point was, the assignment of the whole portion, and if such a practice should be allowed, it would defeat all the care of the court with regard to infants. ibid.

The wife's portion has been decreed to the husband, though he has not made a settlement adequate to it, where the settlement was before marriage, otherwise on a voluntary settlement after marriage. 448

Where, by settlement, the wife has an estate *ex provisione viri*, the court has refused to interpose to settle the estate otherwise. 477

Every voluntary conveyance of the husband is not fraudulent against creditors. 513

Though a husband by law is bound to maintain his wife and child, yet the fund out of which the maintenance is to arise, are liable to his creditors. ibid.

The decrees in the spiritual court for alimony and maintenance, are only against the person of the husband, but affect not the husband's estate so as to take it from his creditors. ibid.

The considerations in deeds are not to be weighed in too nice scales. 514

The husband during the coverture has a legal remedy by distress for the arrears of the wife's annuity, without being first obliged to make a provision for her. ibid.

A covenant of indemnity by trustees to a husband on a separation against the debts of the wife, a good consideration as against creditors. 514 note 1

Bankrupt. See Composition of Debts, under Debts, Merchants.

An assignee under a commission of bankruptcy, cannot compound a debt, without a previous meeting of the creditors. Page 7

Creditors in bankrupt cases are intitled to the interest the husband has in the wife's *chaise in action* during his life. 515

The reason why commissioners of bankrupts compute interest on debts no lower than the date of the commission is, because it is a dead fund. 528

Under old acts of parliament, a man was considered as guilty of a crime or tort, in becoming a bankrupt. ibid.

The court will not carry a voluntary conveyance of a bankrupt into execution against his assignees; otherwise as to a conveyance for a valuable consideration before the bankruptcy. 562

Where by acts before marriage, the husband made himself in the nature of a trustee for the wife, his assignees must be so too of course. ibid.

Bill. See **Answer, Defendant, Plea, Rules, Sequestration, Statute of Limitations, Account, Costs, Matter's Report, Court of Chancery. Bill of Peace, Party, Bill of Review.**

The praying general relief is sufficient, though the plaintiff should not be more explicit in the prayer of his bill. 3

Where general relief is prayed in one part of a bill, and particular relief in another, it must stand over to be amended. ibid.

A bill for want of parties is not dismissed, but ordered to stand over; and a decree of Sir Joseph Jekyl's, to dismiss it on this account, was reversed in the House of Lords. 15

In equity taking a bill *pro confesso*, is analogous to taking a declaration for true at law, where the plea fails. 24

A co-administrator who was a plaintiff in a bill in 1723, brought in 1739, a bill partly of revivor, partly supplemental, to the same purpose, pretty near with the original: Lord Hardwicke allowed the plea of a former *dismission*; for otherwise, he said, it would be keeping up a right in *nubibus* and in

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in custodia legis, and parties would never know when to be at rest. Page 82

Where amendments are so large as they cannot be added, there a new engrossment, and a new service on the parties, is necessary. Page 119

After a plaintiff has had a third order to amend his bill, he shall not be allowed to do it but upon costs to the defendant to be taxed by a Master. 123

If after a cross bill filed, a plaintiff in an original bill will amend it in material parts, and thinks fit to compel an answer to the amendments at the same time with the original bill, he waives his priority of answer to the original. 218

Where a bill is amended both in discovery and relief, the pendency of the suit, as to those parts which are amended, is only from the time of the amendment. *ibid.*

A person may bring a bill with two different aspects, that if one fails, the other may as effectually answer the purpose for which the bill was brought. 325

It is improper to charge in a bill a woman had criminal conversation with particular persons, as it would affect the character of strangers, and fill it with private scandal. 339

A discovery must lead to something material to a suit at law or in equity. note 1. 388

Bill of Peace.

Where a man sets up an exclusive right, and the persons who can controvert it are numerous, and he cannot by one action at law, quiet that right, he may come here *first*, which is called a *bill of peace*, and the court will direct an issue to determine the right as between lords of manors and their tenants, or tenants of one manor and another. 484

Bill of Review. See Decree.

Where a decree is neither signed nor inrolled, you cannot bring a bill of review. 40

It is altogether unnecessary to oblige a man to sign and inroll a decree made against himself, in order to intitle him to bring a bill of review. 117

Where a decree has not been signed and inrolled, a bill in the nature of a bill of review, is a proper one. Page 178

The discovery of new matter in being at the time of a decree, but not known till after, intitles the party to a review. *ibid.*

Papers in the hands of a party to a former cause after publication had passed, though not produced then, may be read upon a bill of review. 179

Where parties apply for leave to bring a new bill, upon new matter discovered after a decree, they must shew that it is relevant; for its being merely new matter will not intitle them to such a bill. 529

The leave of the court must be asked before a bill of review for *new matter* can be filed; *otherwise* if brought to reverse a decree upon error appearing on the face of it. 534

A defendant may plead the decree, and demur against opening the inrolment to a bill of review brought for error apparent, and on the plea and demurrer the court will judge, whether there are grounds for opening the inrolment. *ibid.*

Bishop. See Taxes.

Bond of Obligation. See Attorney and Solicitor, Baron and Feme, Judgment, Marriage, Mortgage, Interest of Money, Game and Gamekeeper, Heir, Redemption and Foreclosure under Mortgage, Statute of fraudulent devises, &c. &c.

Two separate bonds having been given upon the same day for different sums, when one for the whole sum would have been the most proper and natural method, the court directed an inquiry into the consideration of the bonds on a suspicion of fraud. 16

A tradesman ignorant of the nature of a bond, fills up one from *A.* and *B.* to *C.* in which the obligors are only jointly bound: one of them being dead, it was insisted the survivor was answerable for the whole money; but the court relieved the plaintiff, it being the manifest intention of the parties the

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the obligors should be jointly and severally bound. Page 31

Where money is lent to two persons and either through fraud or want of skill, the bond is made joint only, instead of joint and several, these are heads of equity, on which this court relieves.

33
Where a prior incumbrancer has a bond likewise, it shall be postponed to all other incumbrances, whether by mortgage, judgment, or statute-staple. 54
A. gave a woman who cohabited with him a bond for 2000*l.* and interest quarterly during her life, and after her death to her children, but from the date of the bond to the day of his death, which was four years and a half, he constantly maintained her. Lord *Hardwicke* held the maintenance must clearly be taken to have been in lieu of interest. 84

Where no demand has been made on a bond for 20 years, the judge will direct a jury to find it satisfied. 144

The expence a person was put to in standing for member of parliament is not a valuable consideration to support a bond given to reimburse the obligee. 154

154
A bill was brought for relief against a judgment on a bond, in which the plaintiff was jointly bound with his son in the penalty of 100*l.* that the son should not commit any trespass in the Duke of *Beaufort's* royalty, by shooting, hunting, fishing, &c. except with the licence of the gamekeeper, or in company with a qualified person: the son having caught two flounders with an angling rod, the bond was put in suit, and judgment for the penalty, &c. The gamekeeper's brother-in-law, and another servant of the Duke's asked the plaintiff's son to angle with them, when he caught the two flounders, and the verdict was found merely on the evidence. Lord *Hardwicke* decreed the plaintiff should be relieved against the verdict, and that the Duke should refund the 100*l.* recovered on the bond, and the 40*l.* costs of suit. 190

Where principal and interest on a bond is not paid on the day fixed by the master, on the defendant's setting down the cause again, the bill will be dismissed with costs to be taxed. 287

Where there is a bond debt to the wife *dum sola*, and the husband recovers it at law, there is no instance of this court's granting an injunction, for the suit was proper at law; and therefore this court leaves it to its natural course, without meddling with a legal question. Page 420

The creditor may proceed against the heir if he pleases, and he has no way to help himself; for the law knows no distinction of the personal estate's being to be applied first. *ibid.*

The testator himself has laid a real burden upon the lands devised by mortgaging them, and therefore different from the case of a general bond debt. 426

A bond given to *A.* payable at a future time without naming his executors, if *A.* dies before that time, the executors will be entitled to sue upon the bond. 509

Books. See Law Books.

The property of books cannot vest in authors, &c. without being first registered with the Stationers company. 95

The statute of 8 *Ann* c. 19. for vesting the copies of books in authors is not a monopoly, but ought to receive the most liberal construction. 143

Books colourably shortened only are within the meaning of the act. *ibid.*
An abridgment fairly made is a new book, because the judgment of the author is shewn in it. *ibid.*

This is not a case proper for law, as it would be absurd for a judge to sit and hear both books read over, which is necessary where one is only a copy from the other. 144

The parties ought to fix on two persons of learning in the law to compare the books, and report their opinion. *ibid.*

The defendant *Mr. Curle*, on his answer being put in, moved to dissolve an injunction against his vending a book of letters from *Swift*, *Pope*, and others. 342

A collection of letters as well as other books is within the intention of the 8*th* of *Queen Anne*, the act for the encouragement of learning. *ibid.*

The receiver of the letter has at most a joint property with the writer, and the possession

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possession does not give him a licence to publish. Page 342
 Reprinting a book in *England*, which originally was pirated and printed in *Ireland*, will not be suffered, being a mere evasion of *the act*. *ibid.*
 No works have done more service to mankind than those on familiar subjects, and which never were intended to be published. 343
 The injunction continued as to letters written by *Mr. Pope*, not as to those written to him. *ibid.*

Buildings. See Acquiescence.

Lengthening of windows, or making more lights in the old wall than formerly, does not vary the right of persons. 83

Canons. See *Clandestine Marriage, Convocation, Laws, Parliament, Ward.*

THE canons which have not the authority of an act of parliament are not binding on laymen, but certainly are prescriptions to the ecclesiastical courts, and likewise to clergymen. 158
 The canons must be pursued with the utmost exactness by ecclesiastical persons, and a clergyman who presumes to marry a person out of the parishes in which the man and woman reside, is liable to penalties. 159
 The canons of 1603, which relate to clandestine marriages, are the 62d, 101st, 102d, 103d, and 104th, but none of these affect the parties contracting, except the last clause of the 104th, which relates to persons married by colour of void licences. 652
 The court of King's Bench of opinion, in the case of *Middleton versus Croft*, that the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity. 653
 Canons that have been allowed by general consent within this realm, and are not repugnant to the laws, nor to the damage of the king's prerogative, are

still in force as the king's ecclesiastical laws. Page 664
 The clergy are bound by canons confirmed only by the king; but they must be confirmed by the parliament to bind the laity. 665
 No canon since 1603, though made in full convocation, can *proprio vigore* bind laymen. *ibid.*
 In *Davis's case*, 5 G. 1. C. B. L. C. J. *King* said, it was the prevailing opinion, the canons did not bind the laity without an act of parliament, there being none to represent them in convocation. 666
 It is said at the end of the case *Bird versus Smith*, *Moor* 781, to have been resolved, that the canons of the church, made by the convocation, and the king, without the parliament, bind in all matters ecclesiastical, as well as an act of parliament. *ibid.*
 This, Lord *Hardwicke* declared, was a very extraordinary case, and the decree such as will not be allowed as a precedent at this day; for there is no colour to say, that every bishop in his diocese, archbishop in his province, and the house of convocation in the nation may make canons to bind within their limits. 667
 Whatever, said his Lordship, may be the power of convocation to bind the whole realm in matters ecclesiastical, it is no where declared in this case they can bind the laity. *ibid.*
 Lord Chief Justice *Vaughan* in *Hill versus Good*, *Vaugh.* 327, was of opinion, a lawful canon is a law of the kingdom, as much as an act of parliament. *ibid.*
 In the case of *Groze and Elliot*, *Ventr.* 41. Mr. Justice *Tyrrel* held, the king and convocation, without the parliament, cannot make any canons which shall bind the laity. *ibid.*
 Lord Chief Justice *Vaughan* said, in this case, that the convocation, with the assent of the king, under the great seal, may make canons for the regulation of the church, as well concerning laicks as ecclesiasticks. 668
 Another Judge of the court differing in opinion with Lord Chief Justice *Vaughan*, and the other two declaring no opinion at all on the question, greatly weakens this authority. *ibid.*
The

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The opinions, said Lord *Hardwicke*, of *Newton*, *Coke*, *Tyrrel*, *Holt* and *King*, and the answer of the Judges in the Star chamber, mult preponderate against the single opinion of *Vaughan*.
Page 668

Cafe. See Canons, Convocation, Rule and Rehearing.

Upon the appeal in the case of *Peacock* versus *Spooner*, (2 *Vern.* 195.) to the House of Lords, the judges in their opinions were equally divided, but the decree below was affirmed notwithstanding. 73

The case of *Lisle* and *Gray* is differently reported in *Jones*, *Levinz*, and *Raymond*, but by the record of the case searched for by order of Mr. Justice *Tracy*, it appears the judgment of the court of King's Bench was affirmed in the Exchequer-chamber. 90

The decree in *Heli* and *Bond*, *Eq. Ca. Abr.* 342. on appeal to the House of Lords was affirmed by the unanimous opinion of the judges of the courts of Common Pleas and Exchequer. 200

Lord *Hardwicke* expressed his dislike of the decree in the case of *Chidley* versus *Lee*, reported in *Prec. in Chan.* 228. and said he should have been inclined to have determined it otherwise. 523

Sir *Thomas Jones* in his report of *Lisle* versus *Grey*, page 114. has intirely mistaken the case. 574

The essential difference between this case, and *Coulson* versus *Coulson* in the court of King's Bench, the 8th of May 1744, which was the date of the judge's certificate, is, that was a mere legalestate, the present a trust in equity. 580

The case in 1 *Ro. Ab. tit. Executor* 909. relating to *bona notabilia*, is of little authority; and *Rolls* himself expresses his doubt in the place cited; and nothing to the same effect is in the report of the same case. 8 *Co.* 135. 659

In the prior of *Lea*'s case, 20 *H. 6.* 12. it was laid down, that the ordinary by his convocation had power to make constitutions provincial, by which (*ceux de Saint Eglise*) shall be bound, but they cannot do any thing which shall bind the temporality. 662

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Said in the case of the abbot of *Walsbam* *M. 24 E. 4.* 44 *b.* that the convocation has not power to bind any temporal matter, but only that which is spiritual, as to ordain fasting-days and holy-days they are only spiritual judgers. Page 662

The words *la temporalite* in this case ought to have no stress laid upon them, for though they are in the last edition of the Year Book, it is false printed; for in the old edition it is *le temporalite*. 663
Lord *Raymond* and Lord Chief Justice *Eyre*, in a manuscript report of the case of the Bishop of *St David's* and *Lucy*, *Passch.* 11 *W. 3.* *Carth.* 415 agree with the printed one of Serjeant *Cartbnew*. 605

Certiorari. See Writ, Habeas Corpus.

Where the tenor of a record, instead of the record itself, is removed by *Certiorari* out of an inferior court, it is erroneous, as no proceedings can be had upon it. 317

Where a replevin is in a court of record, you may remove it by a *certiorari* either from the court of King's Bench or from this court. *ibid.*

Where a *certiorari* issues in order only to use the record as evidence, then the tenor, if returned, is sufficient, and countervails the plea of *null tiel record*; but when the record itself is to be proceeded upon, the record must be returned. 318

Whether it be before judgment, or after, makes no difference, in both cases the record itself must be removed. *ibid.*

The court may supersede a certificate, but cannot quash it, without a view of the record. *ibid.*

Chancery. See Court of Chancery.

Charitable Corporation.

The bill was brought to be relieved against the defendants as committee-men, or in other offices, and to have a satisfaction for a breach of trust, fraud, and mismanagement. 400

Committee-men are properly agents to those who employ them in the trust
T t to

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to superintend the corporation affairs.

Page 405

A gross non-attendance in a committee-man may make him guilty of the breaches of trusts committed by others.

ibid.

A trustee's saying, he had no benefit from the trust, but merely honorary, is no excuse for his want of diligence. 406

Where a supine negligence appeared in all the committee, by which a complicated loss has happened they are all guilty.

ibid.

A court of equity can lay hold of every breach of trust, be it in a publick or a private capacity.

ibid.

There can be no injury, but there must be a remedy; as the tribunals of this kingdom are wisely formed both of courts of law and equity.

ibid.

Though the committee were not privy to the original fraud, yet they are guilty in the second degree, by neglecting to use the power invested in them, to prevent the ill consequences arising from such a confederacy.

ibid.

Charity, and Charitable Uses. See Costs.

There was a devise to charitable uses under a will in 1734, the testator lived till July 1735, a month after the new statute of mortmain took place, and then dies without revoking his will; upon a reference to the judges for their opinion, whether this was a good disposition to charitable uses, all of them except Mr. Justice *Denton* certified that the devise was good in law. 36

Each particular object may be private, but it is the extensiveness which will constitute it a publick charity. 87

A devise to the poor of a parish, is a publick charity, the same as to a disposition of a sum amongst poor housekeepers. 88

The owner of land charged with an annuity, for the payment of a schoolmaster, will not be excused from the payment thereof on account of their having been no schoolmaster for six years. 238

Though there are not persons in a parish sufficient to answer the description of a charity, yet the land charged with the

payment of a charity is not discharged during that time. Page:

Five shillings per week allowed by *nomine pence*, if either of the half-yearly payments of an annuity was in arrear 42 days after it became due; *the court will direct it only to stand as a security for legal interest when the principal is not regularly paid.*

Commissioners of charitable uses have power under the 43 *Eliz. c. 4.* to give costs, but this court can do it. 11

L. by will gives to *Breadstreet* ward 2c according to Mr. — his will. *L. Hardwicke* would not allow of parol evidence to explain the testator's intention when there is a *blank* only, decreed the money in this case to be disposed of in such charities as the *wardman* for the time being and the principal inhabitants shall think the most beneficial to the ward. 259, 2

Any person, though the most remote the contemplation of the charity, may be relators in an information. 3

Sir *J. T.* devised copyhold lands in *city*, that he had before surrendered: the use of his will, which consisted eleven sheets, the two first of which signed, and died before he signed the rest, nor were there any witnesses. *Lord Hardwicke held it to be a good appointment of the copyhold estate for charity.* 4

Exceptants to a decree of charitable uses were allowed costs on those exceptions where they prevailed; and on those where they did not, the respondents were intitled to costs. 5

Notwithstanding a decree of commission under a commission of charitable uses the court of Chancery may still permit a suit to be instituted here, in which neither side is bound by what appears before the commissioners, but may set forth new matter. 5

Civil Law.

The text civil law takes the differences and distinctions in cases much more rationally than the commentators. 6

The rule to be collected from the passage in the case of the *Duke of St. Albans* against *Mifs Beauchamp*, is, that the party

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parent intention of the testator must govern in double legacies. Page 639

Clandestine Marriage.

The spiritual court has a jurisdiction by the ancient canon law in the case of a clandestine marriage. 668

Clandestine marriages are a growing evil; and therefore the court would not weaken any method by which they may be restrained. 675

The judgment in the cause of *Middleton and Croft* was, that the prohibition stand as to the proceeding only for the plaintiff's being married at an uncanonical hour, and a consultation awarded as to the residue of the cause. *ibid.*

Clerk in Court. See **Solicitor.**

Club.

Where there is a general trust of money for a society, a particular member cannot set off a private debt against a share he may be intitled to on a contingency. 84

Codicil. See **Specifick Legacies.**

A codicil is in it's nature a part of the will, and an extension of the intention of the testator. 630

College and Dean and Chapter Leases.
See **Leases.**

Colliery.

A colliery is a trade, and therefore an account may be taken of the profits here. 630

Colonies. See **Executors, Insurance.**

A commission was prayed, for examining witnesses in the *West Indies*, as the facts arise there, and to stay the defendants proceeding at law on a policy: Lord *Hardwicke* granted the commission, and the injunction, as the voyage was at and from *Carthagena* to *Porto Bello*, and the facts must necessarily arise in the *West Indies*. 359

A testator, who lived in *Jamaica*, gave legacies to be paid in sterling money in the first place, and the two legacies immediately following generally, without saying in sterling money, and, at the end of his will, several more to be paid in sterling money; Lord *Hardwicke* held, that the plaintiff must take his legacy in *Jamaica* money; for his expressing himself differently, shewed a different intention. P. 465

A bond given at *Dublin*, or a note in *Jamaica*, must be paid in the current money; the same with regard to a will. *ibid.*

The legatees living in *England* makes no distinction, for the residence of the person devising must decide it. 466

Tho' the effects are partly in *Jamaica*, and partly in *England*, yet, as this is a devise of a compound residue, without separating the funds, no argument can be drawn from it in favour of the plaintiff.



Committee. See **Lunatic.**

Common Recovery. See **Recovery, Estates in Fee-tail.**

Where the tenant in a common recovery has not pleaded *non-tenure*, he gains a new estate, though the limitations are to the old uses, and the will is revoked by it. 324

The force of a conveyance by common recovery, to extinguish all conditions, powers and incidents annexed to an estate-tail, arises from hence, that the law considers it in the nature of a real action, and the recoveror is in by right. 591

Companies. See **Creditors, The Charitable Corporation.**

The office of a director is of a mixed nature, public, or arising from the charter of the crown, but at the same time, is not an employment that affects the public government, for none of the directors of the great companies are required to qualify by taking the sacrament. 405

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Concealment, Cobin, Collusion. See **Fraud.**

Condition. See **Devisé** under **Will**, **Restraint on Marriage**, **Forfeiture.**

To one **for** life, and to **B.** on certain conditions and restrictions, and to **C.** *in forma prædictâ*, will take in every condition and restriction in the preceding limitation to **B.** Page 620

Condition subsequent. See **Restraint of Marriage.**

It is the constant rule of law, in conditions subsequent, that if the performance becomes impossible by the act of God, it is absolutely void. 18

C. by his will, gives legacies to his nieces, to be paid to them *at* 21, *or marriage*, which shall first happen, provided they marry with the consent of their father and mother, or the survivor of them; otherwise to sink into his personal estate. The legacies vested at their attaining the age of 21, and either of them marrying without consent afterwards, is of no consequence: For Lord *Hardwicke* held, that the marriage, with consent of the father and mother, must be construed so as to relate to the time of the legacies vesting. 587

Construction. See **Exposition of Words.**

Contempt.

It is incumbent on courts of justice to preserve their proceedings from being misrepresented; and the minds of the public should not be prejudiced before a cause is heard. 469

There are three kinds of contempts, scandalizing the court, abusing the parties, and prejudicing mankind before a cause is heard. 471

The calling an advertisement in the *Gloucester Journal* a *lie and cry* after a commission of charitable uses, was held to be a libel in the printer, and the court committed him. 472

Contingent Remainder.

T. B. bequeathed 3000 *l.* to his sons **J.** and **G.** to be laid out in lands in **W.** to be conveyed to them for 40 years, and after the expiration of that term, to the use of **W. B.** his grandson for life, and his first and other sons in tail male, afterwards to another grandson, with like limitations, and so to a third **Gc.** then to the testator's three sons for life successively, And their respective first and other sons in tail male; and for default thereof, to his own right heirs. *Tho' there were no trustees in the will to preserve the contingent remainders, yet Lord Hardwicke ordered such trustees should be inserted in the conveyance to be settled by the Master.*

Page 279

Lord *Hardwicke* said, in the directions he gave in this case, that he adhered to the rules of conveyancing laid down by the great men before the Restoration, and during the Usurpation. 281

The words in *Mrs. R.'s* will, *in case my daughter should die, leaving no heirs of her body*, is a gift to the daughter for life, with a contingent remainder to such heir of her body as shall be living at the time of her death. 646

Leaving, is a participle of the present tense, and relates to the time of the daughter's dying. 647

No weight has been laid on the want of the words for life, where the intention of the testator has otherwise appeared, especially in the case of a *trust executory*, for there this court is bound to see a settlement made agreeable to the intention of the testator. 648

Convocation. See **Canons**, **King**, **Laity**, **Laws.**

In the Convocation, the whole clergy of the province are either present in person, or by representation. 655

Lord *Hardwicke* said, the attempt of counsel to make the power of the convocation in ordaining canons co-extensive with the judicial authority of their courts, is full of so much mischief, that it cannot be contended for with any shadow of reason or of law. 658

That

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That *Newton*, in the opinion he gave on the power of the convocation, means temporal persons as well as things, is plain by the opposition of it to *ceux de Sainte Eglise*, which words signify the persons, not the matters or rights of the holy church. Page 663

Where the case of the abbot of *Waltham*, *M. 24 Ed. 4. 44. b.* came before all the judges in the Exchequer chamber, *Vavafor* said, the power of the convocation doth not extend over the temporal rights of the clergy themselves, and the abbot's claim of exemption from collecting tenths, being a temporal right, he though a clerk, was not bound. 664

The exception, at the end of the convocation case, *12 Rep. 72.* is misprinted, and no weight is to be laid upon it. *ibid.*

Copyhold. See **Surrender, Estates in fee-tail, Charity.**

H. 8. makes his will, and signs it, but it was unattested by witnesses; as the testator had not surrendered his copyhold estate, the question was, Whether it passed? The court held it did; for the statute of frauds and perjuries relates to such estates only as pass by *34 & 35 H. 8.* which takes in fee-simple only, and does not extend to customary estates. 37

Where a man is seised of copyhold lands, and surrenders to the use of his will, and executes a will, though it is not attested by witnesses, yet it shall direct the use of the surrender. *ibid.*

Where the legal estate is in trustees, as he cannot, in that case, surrender the copyhold lands to the use of his will, they will pass by his will only. 38

A copy of an admittance though not signed by the steward of the court, may be read in evidence, where it is of thirty years standing. 45

A copyhold surrendered to the use of a will, passes by a general devise of lands, notwithstanding there are free holds. 85

The same construction, in the cases of surrenders of copyhold estates, must take place, as in all other conveyances at law. 101

Before admittance, a mortgagee may bring a bill of foreclosure; and, after a decree, an ejectment for the possession of the mortgaged premises. Page 101

Fenny lands, being frequently buried under water for seven or eight years, and producing no profit at all to the copyholder, he may, by way of compensation, when the water is drained, and the land improved from the additional soil brought by the floods, be intitled to common of turbary, and to dig up the soil of the lord of the manor for turf. 189

After proclamations made on so many court days, if the copyholders do not come in the lord may seize upon their lands. 449

A decree against the lord of the manor will not bind copyholders in fee, or freeholders for life, who were no parties to it. 516

Corporation. See **The Charitable Corporation.**

Where a certain number are incorporated, a major part of them may do any corporate act, tho' nothing mentioned in the charter. 212

It is not necessary that every corporate act should be under the seal of the corporation. *ib id.*

Costs in Law and Equity. See **Master in Chancery, Word, Rule, Orders, Trustee, Executor, Administrator, Heir and Ancestor, Matters controverted between the Heir, Executor, and Devisee.**

Though there had been no demand, or rent paid in 30 years, yet, as it was recovered by a verdict, the plaintiff shall have his costs at law; but as the laches arose on his part, and the obscurity of the title to the rent, from the want of a demand, for such a length of time, he shall not have costs in equity. 112

In notorious frauds, the court anciently made a defendant pay exemplary costs, but has been for some time refused, from the difficulty of carrying it into execution. 43

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A bill dismissed with costs, where the plaintiff had refused a fair offer of accommodation. Page 48

Where the estates of two testators have been so blended as to create confusion, the executor of an executor shall be excused costs, though it appeared he had assets enough to pay the plaintiff's costs. 80

Where the court think it would accelerate a decree, they will postpone the consideration of costs, till the cause comes back from the Master, though there are sufficient grounds for decreeing them at the hearing. 111

A plaintiff may apply to the court for costs, where a defendant gives unnecessary trouble in carrying a decree into execution. 112

In equity, as well as at law, costs follow the justice of the demand. 113

Notwithstanding a testator directed that his executor, for any expences they shall be put to, shall be allowed costs, out of his estate; yet as there was a plain fraud in this case in the executors, the court decreed costs against them. 126

Where a plaintiff, on a bill to perpetuate the testimony of witnesses, has examined, and thereby had the fruit of her bill, neither his bill nor the defendant are intitled to costs. 167

When a multiplicity of actions have been brought, where the custom might have been tried in one, it is such a vexation, that the plaintiff shall have the costs both in law and equity. ibid.

Where the court did not think the answer full enough, and directed an issue upon the merits, this is not hearing a cause upon bill and answer only, but a subsequent proceeding, and therefore is out of the rule of dismissal, with forty shillings costs. 286

Where a plaintiff, merely to keep his cause alive, replies, and afterwards withdraws his replication, and sets it down on bill and answer only, that it may be dismissed with forty shillings costs, this is evading the justice of the court, for, on the whole, he must have paid the full costs, to be taxed by a Master. 298

Costs in equity are discretionary, and given to the time of the decree; at law, *unless directed post damnum*, and wait till the final judgment. 400

Where the poverty of the plaintiff would not allow her to carry on the cause, Lord Hardwicke ordered the costs to be taxed, and paid to her, to empower her to go on with the suit. Page 400

It is conscience, and not any authority, directs this court in giving costs. 552

Though on a demurrer to a person's being examined as a witness, it has been over-ruled; a *subpoena* cannot be taken out against him for costs, yet the court will give them upon an application by motion. ibid.

Conveyances, Assurances, Construction and Operation of them. See Deeds.

The presumption of a satisfaction is stronger in the case of a deed than of a will, where a bounty is supposed to be intended. 634

Covenant. See Agreement.

Tenant in Tail.

Where there is a covenant for the trustees to convey the inheritance, this court will consider it as actually conveyed, and the term in the trustees as attendant only on the inheritance, and so connected together in the *express trust*, that it can never be severed in favour of an heir or executor, though it may in the case of creditors. 67

Counsellors. See Demurrer, Notice.

Counsel have a right to drafts as precedents, but not to detain them, where either party may have a benefit from the inspection of them. 214

This court will not suffer a counsel to maintain an action for fees, or if he happens to be a mortgagee, to insist on more than legal interest, under pretence of a gratuity for business formerly done in the way of a counsel. 332

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Court of Chancery. See Bond 12
 Obligation Attorney and Solicitor, Creditors, Justices of the Peace, Marriage Articles, Orders, Party, Possession, Deeds, Maintenance, Portions, Receiver, Account, Annual Bills.

The proceedings in this court are formed according to the course of the civil law in some respects, and analogous to the common-law in others. Page 23

In equity taking a bill *pro confesso* is analogous to taking a declaration for true at law. 24

Where persons cannot shew a title at law by the writings being out of their hands, they may properly come into this court. 198

Where a matter which arises within the jurisdiction of the courts of *Wales*, is of value or difficulty, parties may take their remedy here; but if of small consequence, it is an inducement to this court to dismiss the bill with costs. 253

Whilst suits were depending in the court of Chancery, the plaintiffs indict the defendant's agent at the sessions, where they themselves are judges, for a breach of the peace. Lord Hardwicke made an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause, and further order. 302

There is no restraining power over criminal prosecutions in this court. *ibid.*
Pendente lite here, this court would have stopped an action of trespass *vi et armis*. *ibid.*

Where a bill is brought to quiet the possession, if after that a bill of indictment is preferred for a forcible entry this court will stop the proceedings upon such indictment. 303

The plaintiff lent *B.* 500*l.* on note on an assurance that an aunt had left him 4000*l.* by will, *B.* died soon after, and his representatives refused to pay the 500*l.* as the legacy was directed to be laid out in land, and settled on *B.* in fee. Lord Hardwicke said it was a very cruel case; but as it is the established rule of the court, that money directed to be laid out in land shall be considered as land, the plaintiff can have no remedy. 307

Whether the court of chancery can touch stock to satisfy creditors, vide *Taylor v. Jones*. Page 600 and note, 236

Court of King's Bench. See Special Pleadings.

The authority which the Star-chamber had in cases under 4 & 5 *Ph. & M.* relating to the taking away maidens, is now assumed by the court of King's Bench. 64

Courts of Law. See Bill, Possession, Costs, Account, Special Pleadings, Parties.

In courts of law where there is no plea, judgment is by *nil dicit*; but if a plea be put in, though ever so imperfect, there cannot be a judgment *nil dicit*, the plaintiff must demur, and if allowed, then he has judgment, because, the plea, or answer of the defendant, (for answer is equally used at law as in equity,) is insufficient. 23

Where you draw the jurisdiction out of a court of law, you must have all the parties before the court who are necessary to make the determination complete, and to quiet the question. 515

Court of Record. See Certiorari, Habeas Corpus.

Court Spiritual. See Spiritual Court.

Creditors. See Distribution, Purchases, Rules, Orders, Bonds, Special Pleadings, Settlement after Marriage.

The court of Chancery will not decree public companies to make calls in favour of a particular creditor. 56
 An assignment by the clerk of the peace to creditors under the statute for relief of insolvent debtors need not be sealed. 242

If there is a mortgage for years, and the reversion in fee left in the mortgagor, it will be legal assets, because the bond creditor may have a judgment against the heir of the obligor and a *cesset executio*

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curtio till the reversion comes into possession. Page 294

Where a plaintiff, a specialty creditor, must come here for relief the court will do equal justice to all creditors without any distinction as to priority. *ibid.*

Joseph Burr by his will directs his whole estate to be turned into money, and gives it to his executors in trust for the benefit of his four sons and his daughter *Jenny*, to be divided equally between them, and if either die before 21, his or her share to go to the survivor; *Henry Burr*, one of the sons, died under age, and his share went over to the survivors. 4:7

In 1739 *Mr. Vobe* married the daughter, but made no provision for her, and being indebted to the defendant, gave him a bond, and assigned over all the share which in his wife's right he was intitled to in her father's personal estate, and afterwards a second assignment for the benefit of his creditors in general; his wife during these transactions was under age; the executors of the father have made no division of his personal estate; *Vobe* became a bankrupt, and his wife had two children to maintain; her share under the will amounted to about 600*l.* and the defendant the creditor's debt to 500*l.* *ibid.*

Lord Hardwicke was of opinion not to allow the creditor of the husband to receive the fortune of his wife, without making some provision for her; and recommended it to the creditor to give her and her children some part of the principal of her fortune. *ibid.*

His Lordship afterwards decreed, in consequence of an agreement between the parties, that a moiety of the fortune of the wife should be placed out for her separate use during her life, and after her death to be paid to her children in equal shares. *ibid.*

As a father would not have married his daughter without insuring upon some provision; neither will the court of Chancery, who stand in *loco parentis*, do it. 419

Where specialty creditors exhaust the personal assets, simple contract creditors shall stand in their place, and may come upon the real. 436

If a creditor has two funds, he shall take his satisfaction out of that upon

which another creditor has no lien. Page 446

Curtesy.

Tenancy by the curtesy must come out of the inheritance, and not the freehold. 47

A tenancy by the curtesy is an exception out of the inheritance, and a continuation of it for a certain time. *ibid.*

There can be no tenancy by the curtesy, where the children take by virtue of a remainder over, and not by descent from their mother. *ibid.*

To entitle the husband to take as tenant by the curtesy, the inheritance must descend upon the children. *ibid.*

Custom. See **Coppyhold, Cbment, Manors.**

An occupant who is only a tenant at will can never have a right to a common of turbary by taking away the soil of the lord. 190

This court will not put persons to set forth a custom with so much exactness as is requisite at law, or with the nicety the court of Exchequer expects. *ibid.*

Custom of London. See **Witchpot.**

A child of a freeman must abide by the will *in toto*, or by the custom *in toto*. 43

If a freeman of London makes a voluntary deed, in consideration of love and affection only, and reserves the power over the estate to himself, the property will continue in him, and is subject to the custom. 62

The custom of London will operate on the orphanage part of a freeman's estate, and he cannot leave it to go in such proportion as he pleases. 63

A freeman of London taking the advantage of his son's necessities, in consideration of a bond for securing the son an annuity of 50*l.* prevails on him to release the share he had in the orphanage part: the father also prevailed on another of his sons to give him a release of his share of the orphanage part, in consideration of an annuity.

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of the same nature; but there were not the same proofs of his being forced into the release, and the father had at times advanced him 400 *l.* *the plaintiff being turned out of doors, left destitute and void of maintenance, a release extorted under such circumstances cannot be supported, but is absolutely void.* Page 160

The court was also of opinion the other son was equally intitled to be relieved. *ibid.*

By the custom of *London* the orphanage part must go in equal shares, and if the father turns the money into any other shape, which he thinks may take it out of the custom, yet the court has relieved the children. *ibid.*

If a father, merely for the sake of maintenance, and not for advancement in marriage or trade, obliges his son to release his right to the orphanage share, such release is absolutely void. 161

A freeman of *London* by will leaves a son a legacy of 200 *l.* and gives the residue of the testamentary part to his daughter and another person; on the application of the son two years after the will was made, the father gave him 100 *l.* and took a receipt for so much in part of a legacy, and a short time after gave him another 100 *l.* and took a receipt from him in full of what was intended him by the will; the testator died without altering his will, the 200 *l.* must be considered as an advancement, and brought into hotchpot upon the customary share; but how far the son may be intitled to a compensation out of the surplus of the dead man's part, for so much as he shall suffer by bringing the 200 *l.* into hotchpot, the court gave no opinion, reserving this point till it came back on the Matter's report, it being doubtful whether there would be any surplus. 277

It is an established rule that a legatee cannot take the legacy and claim his customary part too, unless the testator mentions the legacy shall come out of his testamentary share. 278

A freeman of *London* assigned over leasehold houses to trustees for particular purposes, reserving to himself an estate for life, where the trust was not to commence till after his decease. *Lord Hardwicke held it to be a fraud on the*

custom, and decreed the deed of assignment to be cancelled. Page 377

A freeman of *London* by will divided his estate according to the custom, and devised the dead man's part among his wife and children; afterwards he gave a daughter 1000 *l.* in marriage, which the court declared to be a satisfaction of the orphanage share, but not as to her share in the dead man's part. 523

A freeman of *London* by will took upon him to dispose of all his estate, as well the orphanage as the testamentary part; where some of the children shall elect to abide by the custom, and others by the will, *their shares of the orphanage part shall not accrue to that part, but shall go according to the disposition of the father.* 627

The children of a freeman may take both parts, when the father has disposed of the testamentary only. 629

The custom, where a wife of a freeman is compounded with, is to divide his estate into two parts, as if there was no wife. *ibid.*

Where the wife has compounded with the husband, a freeman of *London*, he is to be considered in regard to the custom as leaving no wife. 644

Debts, Creditor and Debtor. See Trust for Payment of Debts, Paraphernalia, Rule, Executor, Interest of Money, Statute of Limitations, Separate Maintenance, Power, Assets, Estates in fee-tail, Real Estates, Judgment, Special Pleadings.

WHERE there are mutual demands a defendant upon an action at law may as well set off upon 5 *Geo. 2. the bankrupt act*, as in common cases under *G. 2.* 49

This court only removes fraudulent conveyances out of the way, but will not decree profits back against the original debtor and owner of the estate, received *pendente lite*, in favour of judgment creditors, from the filing of the bill, but equity follows the law, and leaves

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leaves them to their remedy by *elegit*.

Page 107

Simple contract creditors shall stand in the place of bond creditors, and be allowed out of the real estate equal to what has been exhausted out of the personal. 110

Where the land does not yield annual profits, all debts will not carry interest out of a trust for payment of debts. 111

Lands charged by a will with the payment of debts, all the debts contracted by a testator during his whole life will be a charge. 274

Where a father in a purchase takes an estate in it himself for life, with remainder to his son in fee, as the father has the profits for life, the estate is liable to his creditors. 480

The father in this case was in possession of the whole estate, and necessarily appeared the visible owner; so that the creditor by an *elegit* might have laid hold of a moiety, which differs it from all the other cases. 481

It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement, to make it fraudulent; for if he does it with a view to his being indebted at a future time it is equally fraudulent, and ought to be set aside. *ibid.*

Where a creditor agrees to take less than his debt, provided it be paid precisely at the day, and the debtor fails of payment, the general rule of equity is, that he cannot be relieved. 527

Composition of Debts.

Where a creditor for 1700*l.* agrees with his debtor, a failing man, to take 11*s.* in the pound, to be paid by instalments; and the debtor after the first payment becomes a bankrupt; Lord *Hardwicke* was inclined to think, the 1700*l.* and not the gross sum of the composition only, might be proved under the commission of bankruptcy. 527

In what priority debts are to be paid by an executor or administrator, see also under *Assets*.

Decree. See *Bill of Review*, *Parties*, *Acquiescence*, *Account*, *Interest of Money*.

There need not be certain and positive evidence, as to the finding of deeds after a decree, but such only as the court thinks reasonable. Page 40

The Earl of *Bradford* by his will gave all his estate to trustees, in trust for the defendant Mr. *Newport*, and the heirs of his body, and to pay such sums out the rents and profits for his maintenance as Lord *Bradford* should by any writing appoint. By a codicil he directs the trustees during Mr. *Newport's* minority to pay the rents to the plaintiff, so much as she pleases to be applied for his maintenance, and the residue to her own use; by another codicil directs the trustees shall not seise the estate on Mr. *Newport* and the heirs of his body till 26, and till then such maintenance as the trustees and the plaintiff shall think fit. Mrs. *Smith* insisted she was intitled to receive the rents and profits till Mr. *Newport* attained the age of 26, but the Master of the Rolls was of opinion they vested in Mr. *Newport* at 21, and the time of receiving prolonged only till 26, and decreed the trustees should account for the rents, &c. from his age of 21 to 26, to the committee of his estate, Mr. *Newport* being found a lunatic. 344

Shepherd, who had a mortgage for 4000*l.* on *Jennings's* estate, in 1725, forgave him 800*l.* and three years afterwards lends him 800*l.* again; in the intervening time *Titley* advances 2000*l.* to *Jennings*, and obtains a mortgage on the same estate. In 1729 Sir *T. P.* agrees to purchase of *Jennings* 1850*l.* fee-farm rents issuing out of Sir *T. P.'s* estate, and finding *Jennings* had mortgaged the fee-farm rents to *Shepherd* applied to him, who agrees when he is paid his 4000*l.* he will convey them to Sir *T. P.* in a former cause on a reference to a Master to take an account of what was due to *Shepherd*, the Master allowed no more for principal than 3200*l.* and the bill is brought for 4000*l.* and interest, and unless paid, that *Titley* may stand foreclosed. Lord *Hardwicke* said in the other

other cause the Master was confined to *Shepherd's* mortgage, but the present is for a new purpose different from the former, and a mortgagee after a decree for a redemption, may bring a bill for a foreclosure; but the court will not make an inconsistent decree in a second cause between the same parties, on account of the confusion it would create; but at the same time Lord *Hardwicke* declared he would not upon an order in a former cause tie up the plaintiff, but will direct the cause to stand over, so as to give him an opportunity of laying the matter before the court on a bill of review or otherwise, as he shall be advised. *Page 343*

Shepherd insisted, that on advancing 800*l.* again the deed ought to stand as it did before, a security for 4000*l.* the parties intending it should; and his counsel offered to read parol evidence to shew this intention, which was objected to as being within the statute of frauds and perjuries. *Ld. Hardwicke* said, that the loan of the 800*l.* cannot be considered as a continuance of the old mortgage in 1725, and in respect to an intervening incumbrance, is a new one, admitting *Shepherd* to have notice, and therefore would not allow the parol evidence. *350*

The court never suffer a decree to account to be signed and inrolled, because it ties up their hands from relieving, if there should have been any defect in the directions of the decree. *383*

A decree *quod computet* makes no variation as to an executor, for before a final decree he may confess a judgment, and does not at all alter the nature of the demand. *385*

A decree *quod computet* does not pass *in rem judicatum* till the final decree. *387*

No stress to be laid on the words that each party do pay in a decree *quod computet*, for till the account taken it is impossible to pronounce which will be the debtor or creditor. *ibid.*

To support a plea of a former decree, you must set forth so much of the first bill and answer as will shew the same point was then in issue. *603*

Deeds. See Custom of London, Conveyances, Assurance, Construction and Operation of them, Fraud.

Deeds executed near together may be considered as a part of the same transaction. *Page 76*

The intention of the parties appearing on a deed, always governs the court in constructions. *91*

The court will make a favourable exposition of words in marriage settlements to support the intention of the parties, and even in voluntary settlements, if the words lean more strongly to the one construction than to the other, it must likewise prevail. *ibid.*

It is no ground for a court of equity to set aside a deed, that a person put an unguarded confidence in another. *202*

Though the consideration is not expressed in a deed, yet if the court sees what was the real and material consideration, it has great weight, notwithstanding the statute of frauds and perjuries. *ibid.*

A mortgage and an assignment of a mortgage were put in *B.*'s hands to receive the principal and interest, who pawned them to the defendant *S.* for 100*l.* Lord *Hardwicke* held, that as the pawn-er must by the deeds appear to have no property, he could not avoid decreeing *S.* to deliver the deeds to the plaintiff, and leave the pawnee to his remedy at law against *B.* *306*

The plaintiff is proper in bringing a bill here for the recovery of the deeds; for in an action of trover he could only have damages for the detainer. *ibid.*

An attorney's saying that he only followed directions in drawing deeds under fraudulent circumstances, will not excuse him from paying costs. *328*

On deeds the rule is certain, that they shall be controuled by the rules of law, and the intent that appears on the face of the deeds. *575*

Issue in a deed, is always a word of purchase. *582*

Deeds lost or concealed.

Where a deed happens to be lost, you cannot at law read a copy, because you

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you must declare with *profect hic in curia*, and therefore you may bring a bill here to be relieved against the accident of the original's being lost. *P. 81*

Deeds obtained by duress, compulsion, see Bond.

Defendant. See *Evidence, Ne exeat regni, Parties, Rule, Demurrer, Rehearing, Account, Plea, Answer.*

Where a bill is brought for new matter discovered since the hearing, a defendant, if he can shew there is no new matter, must take advantage by plea or demurrer, for it is too late to insist upon it at the hearing. *40*

Where a bill prays an account, and allowances in that account, a defendant may equally make objections, as if he had brought his cross-bill. *59*

Though the plaintiff has not replied to the defendant's answer, yet desiring him to do an act, will intitle the defendant to his costs, to be taxed. *101*

A minister of a parish, who prevents an order for a defendant's appearance being published pursuant to 5 G. 2. c. 25. is indictable for a contempt. *114*

When a defendant has answered to a discovery prayed by a bill, he cannot afterwards demur to it. *157*

Though you answer to the discovery, yet you may demur to the relief. *ibid.*

The defendant prayed to amend her answer by adding a new fact, granted on the particular circumstances of her case. *294*

Where a defendant has mistaken a fact, or a date, the court will give him leave to amend his answer. *ibid.*

Where a defendant cannot be made to appear, it amounts to the same thing as if process had been taken out for want of an appearance, and carried on to a sequestration. *510*

Demurrer. See *Witness, Defendant, Costs, Plea, Usury, Merchants, Injunction, Restraint of Marriage.*

A defendant must take advantage of a defect in form, by a demurrer; it is too late to object after he has answered. *137*

A demurrer to a bill, for the discovery of a case which the defendant had stated to his counsel, for an opinion, over-ruled. *Page 214*

Though a defendant has not demurred to a bill, as being too trifling for this court to entertain, yet he may take advantage of the objection at the hearing; for a bill may have been so drawn, as to have prevented a demurrer. *253*

A man who demurs at law, demurs in chief, and it is a perpetual bar, if judgment should be against him; but if a demurrer is over-ruled here, a defendant may insist afterwards upon the same thing by his answer. *284*

The defendant demurred to the discovery sought concerning proceedings before the court of delegates. Lord *Hardwicke* held, that the sentence in the delegates cannot be read, as this is a demand for real estate; and they proceed there by different laws, and in matters too relative to the personal estate only; and allowed the demurrer as to this part. *387*

The defendant also demurred to the discovery sought with relation to the perjury, in a suit at law, charged to be committed by her procurement. *ibid.*

As a demurrer cannot be good for part, and bad for part, Lord *Hardwicke* allowed it likewise as to the discovery sought in relation to the subornation of perjury. *389*

A demurrer will lie to a bill brought, which seeks a discovery of the defendant, whether a particular person is living, or where he is, in order only to make him a party to a suit. *394*

A bill brought by a principal, to discover what goods the defendant bought of his agent; he demurred, for that he is not obliged to set out what gain he has made by the retail of them; but the demurrer was held to be insufficient, and over-ruled. *ibid.*

The defendant demurred to the plaintiff's bill, brought to establish a right to an oyster fishery, and to be quieted in the possession of it, as being a matter properly triable at law. Lord *Hardwicke* declared, that where the right of a fishery is in dispute only between two lords of manors, they can ne ther come here *nil*

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Will it is first tried at law, and therefore allowed the demurrer. Page 483

Depositions or Examination, See Evidence, Witnesses.

On a bill brought by a wife against her husband to have a maintenance out of her fortune, on suggestion of cruel usage by him; depositions to prove criminal conversation against the wife, in excuse for his ill usage, cannot be read, unless the criminal conversation is expressly charged by the answer. 96
Charging the wife has behaved in an indecent manner, will intitle the husband to read evidence against her of criminal conversation, for it is not necessary, to make the charge in gross terms. 97

This court will order depositions to be referred to a Master, for scandal and impertinence. 235

A bill was brought to establish a bond, for securing an annuity of 60*l.* per ann. given the plaintiff, as *premium p^{re}dictie*; a cross-bill praying the security may be delivered up as the plaintiff was a common prostitute. The defendant's counsel offered to prove the plaintiff guilty of lewdness with a particular person; it was objected, the charge in the cross-bill being only, she was a lewd woman, the defendant ought to confine herself to a general character, and not to particular instances. Lord Hardwicke thought the objection of great consequence to the practice of the court, and took time to consider till the first day of rehearing after the term. 333

On the 27th of July, 1742, Lord Hardwicke, on a rehearing of this cause, said, it is sufficient to put in issue a general charge of lewdness, and under this you may give particular evidence, but then it must be pointed and applied to the general charge. 337

That a wife has *misbehaved herself*, does not imply she is an adulteress: and a deposition in that case to prove her one ought not to be read. 338

Saying that a wife did not behave with that duty as became a virtuous woman, will not intitle the husband to enter

into proof of her committing adultery, unless there is an express charge of this kind, for the virtue of a woman does not consist merely in chastity. P. 338

Depositions de bene esse.

It is too late at the hearing of the cause to object to depositions taken *de bene esse* for irregularity; in such a case the court ought to have been moved to discharge the order for publication. 190

Deposition. See Dissenters.

Descent. See also Purchase.

If the same estate is devised to *H.* which he would have taken by descent, he is in by descent. 293

Dissenters.

At an assembly of Lord Chancellor *Ellesmere*, the Lords of the council, and all the justices of *England* in the Star-chamber, it was held, that deprivations of puritan ministers by the high commission court were lawful. 605

Debt and executo^ry Debt. See Will.

Debt for Payment of Debts. See Trusts for raising Portions, Payment of Debts.

Distribution. Who shall be preferred with regard thereto.

A creditor cannot take an assignment of a bond given by an administrator, pursuant to the statute of distributions, to administer faithfully, and exhibit an inventory, &c. nor will an action lie upon it, tho' assigned for a breach he was indebted to the assignee in the sum of 200*l.* upon specialty. 66

J. W. died intestate 1724, and left issue *T. W.* who died within a week after his father, and his wife *ensuing*, and on the 20th of *May* following was delivered of a daughter: she is intitled to her share under

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under the statute of distributions, as much as if she had existed in his lifetime. Page 115

There is no determination under the statute of 1 Jac. 2. that the half blood shall take equally with the whole. 116

The principal intention of the act of Jac. 2. is to prevent the mother's running away with too much to her children by a second husband. ibid.

That the shares vest on the death of the intestate, holds equally in lineal and collateral succession. 117

The contention between the common law and ecclesiastical court, gave rise to the statute of distributions. ibid.

The jurisdiction of the ecclesiastical court made more extensive by the statute, than was allowed by the common law. ibid.

The statute of distributions is to be construed by the rules of the civil law: The act of 1 J. 2. is an act of continuance of C. 2. and ought to be construed in the same manner. 118

The civil law makes a difference between a child *in ventre sa mere in esse*, at the father's death, and only conceived. ibid.

Divine Service. See Parson, Collection.

Reading prayers, or a sermon, in a private family, is not performing divine service. 459

Divine service is an expression made use of in several acts of parliament, especially in those that direct the reading of proclamations, where the order is, that it be read after divine service. 500

Donatio Causa Mortis. See Legacy.

Dower. See Baron and Feme, Free-Bench.

The defendant purchased a real estate of the plaintiff's husband, and the estate being in mortgage for a term, he agreed to pay it off out of the purchase money, and to assign the term to a trustee for the purchaser to attend the inheritance, which was accordingly done; the husband died in 1719, and in 1737

the plaintiff brought her bill against the defendant, for an account of profits, and to be paid her dower: Sir Thomas Abney sitting for the Master of the Rolls, decreed dower for the plaintiff, but Lord Chancellor reversed the decree, and dismissed the bill without costs P. 108 Since the case of *Radnor v. Vandebanck*, *Shrewsbury's Parl. Cas.* 69. it has been a settled rule, that if a purchaser has taken in a term precedent to the right of dower, be it a satisfied one, or money paid for it, it is a bar to the wife's dower; but if the mortgage had subsisted at the husband's death, the wife might have redeemed and been intitled to dower; or if he had paid it off, and taken an assignment of the term to attend the inheritance, and died seised, the wife would have been endowed. 209

All the cases in relation to the point of dower are settled and reconciled in *Radnor v. Vandebanck*. ibid.

Though a husband devises an estate to a wife larger than her dower, she is intitled to both notwithstanding. 427

It is now an established doctrine, that a wife is not dowable of a trust estate. 5:6

In *Danks v. Sutton*, Sir Joseph Jekyll took a distinction in regard to a trust, where it descends to the husband from another, and not created by himself; but Lord Talbot afterwards, in the case of the *Attorney General v. Scott*, determined directly contrary to this distinction. ibid.

Ecclesiastical Court. See Spiritual Court.

Ejectment. See Younger Children.

THE confession of lease, entry, and ouster, will operate only to the purpose for which the ejectment is intended, and is equally fictitious with the ejectment itself. 241

A mortgagee is not precluded from bringing an ejectment at law at the same time he has a bill of foreclosure depending here. 343

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Election.

A bill being brought here, praying relief as well as a discovery, whilst an action at law was carrying on upon the same account, the court obliged the plaintiff to make his election; who electing to proceed at law, he amended his bill, by striking out the part which prayed relief, and the bill thereupon was dismissed of course, as praying nothing but a discovery; and the costs of the dismissal were taxed to the defendant at 3*l*. The plaintiff recovered judgment against the defendant in damages and costs to the amount of 44*0*l. and petitions to set off the costs at law against the costs here. *Lord Hardwicke thought it reasonable; and if the precedents, (which he ordered to be searched) would justify him, said, he would grant the petition; but he doubted whether the practice of the court would allow of it, by reason that the bill of discovery had been dismissed out of court.* Page 166

Equity. See Court of Chancery.

Estates. See Trustees to preserve Contingent Remainders.

Estates in fee-tail. See Father and Son, Catching Bargain, Exposition of Words, Trustees to preserve contingent Remainders. Tenant in tail.

With respect to limiting *personal* property by words which if applied to *real* property would create an estate tail, and the general doctrine thereon and of limitations created of personal estate, See note 1, 89

A copyhold surrendered to the husband for life, to the wife for life, remainder to the heirs of the bodies of husband and wife, remainder in fee to the survivor, gives to the wife, who survives, an estate-tail only, after possibility of issue extinct, and the estate-tail vests in the heirs of the husband and wife. 101

If tenant in tail, remainder in fee, grants an estate to A. to commence after the death of tenant in tail, and then levies a fine to other uses, A.'s estate is merged in the fine. 199

It was made a question 150 years ago, but is now settled, that if tenant in tail, remainder in fee, levies a fine, a common recovery bars the fee, and the issue in tail have not a *scintilla juris*. P. 201 The son's recovery would have barred the creditors; a fine would not have done it, for the reversion in fee would still have been liable. 206

The estate now come into possession, is liable to the specialty debts of the father; and, by circuit, the simple contract creditors are to stand in the place of satisfied bonds. *ibid.*

A devise of lands to one for life, and to the heirs of his body, has always been held to be an estate tail; but where it is to one for life, and after his death to the issue of his body, there is no instance where it has been so construed. 265

A devise to A. for life, and to the heirs of his body, unites the two estates so, as to make the first taker tenant in tail. 444

Estates for life. See Father and Son, Estates in fee-tail, Waste, Exposition of Words, Trustees to preserve contingent Remainders.

As a tenant for life, and the person in remainder in nature of a tenant in tail of a freehold lease may certainly join, and bar the next in limitation, so he who has both the interests united in himself may also bar the intail of such a lease. 259

Where a second son is tenant for life of a freehold lease, remainder to the heirs of the body of the father, the tenant for life, and the elder brother may bar the intail. 260

The course of the court with regard to a tenant for life is, that he shall keep down the interest by rents and profits, but portions or principal money on any other incumbrance shall be borne by the whole estate; and therefore the defendant Sir George Savile shall not account for the rents or the value of the timber cut down, in order they may be applied towards raising the daughters' portions. 463

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Estates for Years. See Fine, De- vise.

A demise of a lease for years to the same person to whom the fee is devised, and which commences in the life of the deviser, is no revocation of the fee. *P. 72*
Where there is a devise of a lease for years to a man, and if he die without issue, remainder over, the whole interest vests in the first taker; otherwise if it had been a lease for lives, for there the first taker had a power over it only during his own life to have disposed of it, but if he makes no use of that power, immediately upon his death it vests in the remainder-man, who takes as a *special occupant*. 376

Estates by Implication. See Im- plication.

Term attendant on the Inheritance.

A term attendant on the inheritance is considered as a part of it, and shall not be severed from it, nor can it pass without it. 72

Limitation of terms for Years. See Money, Portions.

An agreement for a dean and chapter estate, though signed by the dean only, shall bind the chapter. 45

Edward Buffy possessed of a term for 59 years by a settlement made after marriage, conveyed it to trustees in trust to permit his wife *Grace Buffy* to receive the rents during the term, for her separate use, if she so long live, and after her decease to permit him to enjoy the rents during his life, and after his decease in trust for the *heirs of the body of Grace by Edward Buffy*, and for want of such issue, remainder to *Henrietta Hodgson* for her life, and after her decease in trust for her two sons *William* and *Edward*. 89

Edward Buffy died, having never had any issue, and *Grace* his wife survived him. It was held that the whole term was not vested in *Grace Buffy*, and that the words *heirs of the body* were not words of limitation but purchase, and the lease was ordered to be deposited in

court for the benefit of all parties.

Page 89

Words of limitation are improperly used on terms for years. 90

The words *if Grace Buffy shall so long live* are an affirmative implying a negative at the same time, that if she did not live so long, the remainder of the term should go over. 91

For want of such issue, is the same as for want of such son or such daughter, for the word *such* confines it to such issue as is meant by the words *heirs of the body*. 92

Heirs of the body here mean the heir of the body living at the death of *Edward Buffy*, or born in a reasonable time after. *ibid.*

Evidence and parol Evidence. See Baron and Feme, Decree, Co- pyhold, Depositions, Papist, Wit- ness, Writings, Fraud, Charity and Charitable Uses, Infant.

A witness if interested must produce a release, or his evidence cannot be read. 15

The rule that you can have no decree upon the evidence of a single witness against the oath of a defendant in his answer are equally strong with those that are affirmed by the deposition. 19

Where a plaintiff sets up a title to an estate, and makes a person defendant who disclaims all right, though the plaintiff does not bring him to a hearing, he cannot read his evidence as a proof of his own right to the prejudice of another defendant. 39

The rule with regard to evidence is a reasonable one, and such as the nature of the thing to be proved will admit of. 40

J. W. being solicited by *T. W.* and his sister to do something for them, said if you will surrender your copyhold for the benefit of *R. W.* I will secure annuities to each of you for lives; whereupon *T. W.* promised to surrender his copyhold accordingly; and *J. W.* did actually surrender his, charged with annuities of 5 *l.* per ann. for *T. W.*'s life, and 2 *l.* 10 *s.* for the sister. *R. W.* the defendant to the bill brought by *T. W.* for the annuities, refused to pay them unless *T. W.* will surrender his own

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copyhold estate, pursuant to his life, and insisted, though there was written agreement between *J. W.* *T. W.* parol evidence may be added to prove this fact; *the court of R. W. may be allowed to read evidence to rebut the equity set up W.'s bill.* 524

Page 89
ence set up by *R. W.* arises from imposition of the plaintiff *T. W.* therefore is not at all affected by statute of frauds and perjuries.

99
or quit-rents and an account pro-
l, it must be proved to have been
ard or bailiff's, or it is not evidence
yment here say more than at law.

140
the evidence of a single witness
ft a negative in a defendant's an-
s corroborated by a great number
cumstances, it is sufficient to sup-
in equity. *ibid.*

dence of a neighbouring manor
not in general be admitted to shew
ustoms of another manor, because
is to be governed by it's own.

189
not so universal as not to be va-
n some instances: for in mine-
ries, the courts of law have ad-
d evidence with regard to profits
ines, &c. out of other manors,
they are similar, to explain
ustom of the manor in question.

ibid.
a person is mentioned by a nick-
, or where there have been two
as who have had the same christian
urname, parol evidence has been
ted to ascertain whom the testator
t.

239
tation of Witnesses. See De-
positions.

endant having examined Mr.
w, his clerk in court, the plaintiff
ited interrogatories for cross ex-
g him, to which he demurred, for
he knew nothing of the matters
red of, except what came to his
ledge as the defendant's clerk in
, or agent. *Lord Chancellor over-
the demurrer, and ordered him to an-
to the interrogatories.* 524

II.

This demurrer covers too much, it ought
to conclude, that he knew nothing but
by the information of his client. *P.*

524
Where at law the party calls upon his at-
torney for a witness, the other side may
cross-examine him, but it must be only
relative to the same matter. *ibid.*

Counsel, solicitors or attornies may be pri-
vileged from being examined in such
cases, but not an agent. *ibid.*

Dolliffe, on his going abroad as a supercar-
go, by articles covenanted with the
South-sea Company he would not demur
to any bill they might bring within
two months after his return, which was
altered afterwards to *six*; *Gambier*, who
drew the articles demurred, as counsel
to the company, to *Dolliffe's* exami-
ning him: the demurrer over-ruled,
for *that what he knew was as the con-
veyances only.* 525

Exceptions. See Master's Report.
Answer.

Exchanges.

In the law of exchanges, where there is an
alienation by one of the parties, and an
eviction, it is not clear whether the heir
at law or the alienee should enter. 369

Excommunication.

Lord Hardwicke over-ruled all the excep-
tions upon a motion to quash the writ
of *significavit*, and held there was suffi-
cient in this case to warrant the court
to issue the *excommunicato capiendo.* 498

A man may be resident in one diocese,
and come into another, and commit
the offence charged upon him in the
significavit, and this, for the purpose
of being cited, is a residence sufficient;
and he may be prosecuted in the
diocese where he committed the of-
fence, or otherwise there would be no
remedy. 500

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Execution of a Power. See Power, also Deeds. and the construction and operation of them.

Executor and Administrator. See Bond, Exposition of Words. Trustees, Co'ss, Assets, Legacies, and under the Legacy the division of Abatement and refunding of Legacies, Decree.

Where a man purchases a leasehold estate from an executor, it ceases to be a trust on the land; for where money is wanting an executor must sell. *Page 42*

Where a creditor of a testator accepts of an executor's bond, it is considered as a new security, for it shews he relies more on the executor's credit than the charge in the will. *ibid*

An express devise of an estate to an executor to sell, or a charge on it for payment of debts, without such power, gives him an equal right to do it. *43*

Where an executor is also the trustee for payment of debts, the assets shall still be equitable, and not legal, and all the creditors must be paid *pari passu*. *50*

An administrator, though insolvent, must be a party to a bill for discovery of assets. *51*

Where one executor is indebted to the testator by mortgage, if the co-executors are apprehensive he is insolvent, they should bring a bill against him for sale of the estate, and not for a foreclosure, because being an executor has given him an interest in the mortgage. *56*

Two persons executors and trustees under a will, would not prove the will, nor suffer the *cestuy que trust* to take out letters of administration *cum testamento annexo*, till he had executed a deed, by which he was to pay a hundred pounds to one executor, and two hundred pounds to the other, within six months after they shall have exhibited an inventory. Lord Hardwicke declared the deed was unduly obtained, and decreed no allowance should be made for the sum of 100*l.* and 200*l.* to the plaintiffs. *58*

As to payments made by an executor to infants. Vide *80*

An administration taken out here will not extend to the colonies in America, but

an agent there, who gets in assets under the exemplification of a probate, is equally chargeable as if the executor got them in himself. *Page 63*

A debtor leaves a creditor by note payable on demand his executor; this court will not allow him interest for it because he may turn money to his own advantage, which is coming in by the testator's assets. *106* but see note 2

Though executors are not to pay costs, yet they shall not be allowed any, because they are supposed to reimburse themselves by the credit they take in the account kept by them. *108*

Where the representative of an intestate is seeking to give preference by contesting judgments, the court will give the plaintiff leave to proceed at law to recover judgment with a *cessante executione*, and in this court, for a discovery and account of assets. *119*

Though an administration is not taken out till after the filing of the bill, yet if procured before a cause comes to a hearing in equity, it is sufficient; otherwise at law, because there the defendant may crave *oyer* of the letters of administration. *120*

If an executor, for the benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but you may still follow it as much as if it continued in the same condition as at the testator's death. *159*

A wife who was an executrix was restrained from getting in the assets of a testator, her husband being in the *West-Indies*, and not amenable to the process of this court. *213*

A receiver appointed to collect in assets, and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions. *ibid.*

An executor before probate may so far as to get in and receive his testator's estate, or release debts, or even bring actions for them. *285*

Though executors have a year to pay legacies, yet that does not extend to debts, but they are liable to be sued the moment after the testator's death. *301*

An executor by an established rule of law may retain to pay his own debt, but is

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not obliged to take in part, where there are not assets enough to pay the whole.

Page 411

A provision out of a real estate for one executrix will not bar her, neither will specific legacies given to one, bar either of the residue in the personal estate, but are put in only to give one a preference of the other.

626

A testator may give an executor the personal estate as a legacy, and exempt from debts.

ibid.

How to account.

It being an express condition of an executor's taking himself under a will that he should discharge the legacies, within a year after the testatrix's death, he paid into the hands of the three children of P. their legacies of 100*l.* each; the eldest sixteen, the second fourteen, and the youngest nine years of age, at the time the father embezzled the money; the children by their bill demanded a repayment. Lord Hardwicke held at first, that as the executor made this payment to save a forfeiture of what he himself took under the will, he ought not to pay it over again; but afterwards thinking it a doubtful point, recommended it to the executor to give the children something, who agreeing to pay 50*l.* to be divided amongst the three, they were ordered to release their legacies.

80

The rule laid down by Lord Cowper in the case of *Dayley versus Tolferry*, 1 Wms. 285. that in all cases where executors pay infants legacies to fathers they shall be paid over again, Lord Hardwicke declared he thought was too strict.

81

Though the person is come of age, during whose infancy the will appointed an executor *durante minore etate*, yet, if the executor *durante*, &c. has not collected in the whole estate, he must be brought before the court.

121

In what cases an executor shall or shall not be a trustee.

Where there is any declaration that executors are but trustees, or if they have particular legacies given to them, the

rule of the court of Chancery is, that the residue shall be considered as undisposed.

Page 18

Where a testator appoints a person executor, it is giving him the residue, unless he has a particular legacy, and the same rule holds in the ecclesiastical court.

46

A legacy given directly to B. or to A. in trust for B. is the same thing, and equally excludes the residue.

47

Where a residue is given to an executor for life, it implies a negative, that he shall not have it for any longer term.

ibid.

Where the residue is undisposed, and a testatrix has always declared the next of kin shall have nothing, the executors, tho' they are legatees, shall have the residue notwithstanding.

68

The court, with respect to the residue, will depart from their general rules in favour of the next of kin, where the testator's intention is proved to be against them.

69

If the court is satisfied, the next of kin were not intended to have the residue, the executor must have it of course, for there is no medium between them and executors.

ibid.

A testator gives the residue of his estate to his executrix, or to her heirs, executors, administrators or assigns; she died in his life-time; the court held it was given her as executrix, and she dying before the testator, he is dead as to the residue.

86

At law, a legacy does not vest in the legatee till the executor's assent, but here he will be decreed to deliver the specific legacies according to the will, being considered in this court as a bare trustee for legatees.

77

Explication of Words. See Condition, Contingent Remainder, Trust, Will, Heir, Devise, under Will, Words.

The word *estate* in a will is sufficient to pass not only the land, but the interest the testator has in it likewise.

38

A devise of plate, jewels, linen, household goods, and coach and horses, will be confined to things of the same nature: goldsmiths notes, and bank

U 2

bills

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bills do not pass by those words. Page 103

A testator, having divided his personal estate into eight shares, gave four parts to his niece *Buffar*, and the children born of her body; the plaintiff was born after the will was made, and Mrs. *Buffar* dies in the testator's lifetime; *this is not a lapsed legacy, for she did not take an estate tail, but as a joint-tenant with the plaintiff; and as she is dead, he takes the whole by survivorship.* 220

Children are words of purchase, and not of limitation, except it is to comply with a testator's intention, and it can take effect no other way. 222

K. by his will says, I make D. my sole heir and executrix, and if she dies without issue, then to go to Lord George Beauclerk: D. levied a fine and suffered a recovery of the real estate, and insists she has an absolute right both to the real and personal estates of the testator, and not obliged to account. Lord *Hardwicke* held the limitation over was void, and cannot be confined to the descendants dying without issue living at the time of her decease, and dismissed the bill. 308

Then, in the grammatical sense, is an adverb of time, but in limitations of estates, and framing contingencies, it is a word of reference, and relates to the determination of the first limitation in the estate, when the contingency arises. 311

According to Lord *Hardwicke's* note of *Forth and Chapman*, Lord *Macclesfield* held that the words, *leave no issue*, must relate to the time of the deaths of the testator's two nephews, *William and Walter*, and could not be extended to a dying without issue generally. 313

T. H. gives 500*l.* by his will to be paid to his grandson T. P. if he lived to be 21, and in case he died before, then to the other child or children of his daughter M. P. equally arriving at such age. T. P. died before 21, and no child of M. P. was born or living at the testator's death. The grandchildren born after the death of T. H. are intitled to the 500*l.* for not being in esse in his life-time, he must have had

in view the future children of his daughter. Page 329

The words, *equally arriving at the age of 21*, making it doubtful, whether any thing vested till 21, the court directed the 500*l.* to be put out to interest, and paid in the mean time to the testator's son; but if the child or children of P. arrived at their ages of 21, then the 500*l.* to be paid to them and interest from the time it became payable. 330

An elder daughter, where there is a son is deemed in equity a younger child. 457

The word *reprises* is of uncertain signification; but ought to be construed *secundum jurisdictionem materiam*. 545

Cowell's Interpreter, and *Blount's Law Dictionary*, explain the meaning of *reprises*; but *Speiman*, who is a far better antiquary than either of them, has not the word in all his Glossary. *ibid.*

A direction in a will, that the interest, with the principal, of the residue of a testatrix's real and personal estate, shall be settled on her daughter, or the heirs of her body, as the executors shall think fit, will not empower them to give it from the daughter to the grandchildren: for in this case, the word *or* must be construed *and*, in order to put a reasonable construction on the will. 643

Factor and Principal.

WHERE a factor makes an agreement for the hire of a ship with the master, on his own account, for 48*l.* a month, and not on the part of the merchants his principals, they are not liable, nor their goods put on board to satisfy the matter's demand, but they are liable to pay the factor the freight for the cargo; and as he was bound by the charter-party, which gave the master a specific lien on the goods, he has a right to be paid in the first place, before the assignees of a factor under a commission of bankruptcy against him who stands only in the place of the bankrupt. 651

If a factor becomes a bankrupt, and the merchant's goods are not mixed with his, they shall have them. *Page 623*

Whoever lets his ship to hire, must take care the hirer is substantial; for if he be not competent, the master must suffer for his neglect. *ibid.*

To pay custom for salvage, a factor may detain goods. *ibid.*

Father and Son. See **Fraud, Grandchild, Court of Chancery, Purchase, Witness.**

An agreement between a child and a father to alter the limitations under a settlement, will not be set aside, on pretence of a son's being drawn in by the father's power and authority. *85*

A parent's duty to provide for all his children, will extend to posthumous ones. *116*

Where a father, tenant for life, draws in a son, tenant in tail, to join in a conveyance which would destroy his remainder, this court on very slender evidence of such a practice in a father, will relieve the son; for such an attempt in a father is a plain fraud upon the custom. *161*

Lord Chancellor *King*, in the case of *Gliffen* versus *Ogden*, refused to give relief on a conveyance obtained by a father from a child, as thinking it a fair bargain; but the Lords, upon an appeal in *March*, 1731, laid great weight on the circumstance of the conveyance being obtained by a father from his daughter in distress, and reversed the decree. *258*

The defendant's late father gave a judgment to the plaintiff's testator for 120*l.* a settlement set up in bar, made after the marriage of the defendant's father and mother in 1694, in which the father was tenant for life, the mother tenant for life, and the defendant first tenant in tail; in 1700, the father purchased 4*l.* *per annum* jointly with the defendant, to them and their heirs: in 1708, he made another joint purchase with his youngest son of 5*l.* *per annum*, and settled it as a provision for his younger children, paid the purchase-money for both the estates, and continued in possession to his death

in 1735; the plaintiff insisting that all the estates are subject to the judgment, and that the settlement being after marriage was voluntary, brought his bill to have satisfaction out of the estates of the consor of the judgment. A creditor on the circumstances of this case was decreed to be let in upon the estates jointly purchased by the father and his sons, and a moiety of each directed to be sold, and the money arising therefrom to be applied to the satisfaction of this judgment.

Page 477

Though the father pays the whole consideration, yet, if the purchase is made in the name of a younger son, the heir cannot maintain it as a trust for the father. *480*

Though it may be proper *stare decisis* yet Lord *Hardwick* thought the cases had gone full far enough in favour of advancements, and that he ought not to carry it further. *ibid.*

The reason why a purchase in the son's name, though the possession continued in the father, has been held an advancement of the son, is, because the father was his natural guardian during his minority. *ibid.*

A purchase in the names of father and son, as *joint-tenants*, is no advancement of the son, as it does not answer the purpose, for till a division, the father has the possession of the whole, and even after it a moiety, besides the chance of the other moiety by survivorship. *ibid.*

Free-farm Rent. See **Distress and Rent.**

Free-simple and Free-tail. See **Estates.**

Fine. See **Covenant.**

A covenant in a mortgage-deed by a husband and wife in 1692, to levy a fine in the *Easter* term following, but was not levied till *Trinity* term, 1695; for 10*l.* more they join in a conveyance of the equity of redemption, and covenant the fine heretofore levied should be to the uses of this deed. The covenant in 1695 held to be good,

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and binding on the husband and wife, and that the former deed might be laid out of the case, as the covenant under it for levying the fine in *Easter* term was not strictly pursued. *Page 79*

Tenant for years, at will, or at sufferance, cannot, by fine, devise an estate and turn it to a right. 240

If a person has lost his right by a legal bar, he can have no remedy. *ibid.*

Though in a fine there are often more parcels of land than belong to the co-nusor, yet a court of equity will restrain it to such lands as really belong to him. 241

Where a fine and non-claim is levied by one who got possession under a forged deed, a court of equity will decree against the fine. 381

Where tenants give a conditional possession only, provided they may pay their rents to a third person, till a suit is determined, a fine levied under such a possession will not be suffered to stand. 390

Should such a fine prevail, what is said to be a solemn act, and the end of all controversies, would cease to be so, and introductory of numerous frauds; even at law, fines will be set aside for fraud; as in a case of a tenant for years. *ibid.*

If a person purchases an estate, which he sees has a defect upon the face of the deed, yet a fine will be a bar; for that defect is the very occasion of levying the fine. 631

A person, who purchases from a trustee who levies a fine, is as much a trustee as he was; the same as to a grantee of a mortgagee, his fine will not discharge the equity of redemption. *ibid.*

The operation of a fine and non-claim is not by turning it into a right, but it is by force of the bar arising from the statute of non-claims. *ibid.*

Forfeiture. See **Restraint on Marriage**, under **Marriage**, **Condition**.

Where there is a condition annexed by a will to a devise of real or personal estate, and no notice required to be given, unless the legatees perform the condition they cannot be intitled, and

where there is a devise over, a forfeiture incurs. *Page 616*

Fraud. See **Heir and Incestor**, **Marriage**, **Agreement under hand**, **Attorney and Solicitor**, **Baron and Feme**, **Bonds**, **Catching Bargain**, under **Heir**, **Collusion**, **Cobin**, **Concealment**, **Deeds**, **Executors**, **Imposition**, **Account**, **Charitable Corporation**, **Will**, **Father and Son**.

A note of hand, at the beginning of it was mentioned to be for 20*l.* borrowed and received; but at the latter end were these words, *which I promise never to pay*. Lord Chief Justice Parker held, the plaintiff in the action as well intitled to recover the 20*l.* upon the lending on one side, and the borrowing on the other, notwithstanding the words in the conclusion of the note. 32

Where money is lent to two persons, and either thro' fraud, or want of skill, the bond is made a joint only, instead of a joint and several bond, these are heads of equity, on which the court always relieves. 33

Where a mortgagee was present, whilst a mortgagor was in treaty for his son's marriage, and fraudulently concealed his mortgage, the court decreed the son, the wife, and the issue, should hold the lands against the mortgagee and his heirs. 49

Where a person, advancing money, refuses, after an absolute conveyance, to execute a defeasance, this court will relieve against the fraud. 99

In a case of fraud, the evidence of a person who joined in granting and conveying away her estate was admitted, tho' it invalidated her right to the estate she had so granted and conveyed. 228

Where a father obtained an absolute conveyance from a daughter, in order to answer one particular purpose, and afterwards makes use of it for another, this court will relieve under the head of fraud. 254

The plaintiff, as heir at law to Sir *John Lee*, brought a bill to set aside a conveyance of the estate of the defendant on a suggestion of fraud, imposition, and

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and undue influence: Lord *Hardwicke* held, the plaintiff ought to be relieved, and decreed the deed should be delivered, and possession of the estate likewise given him. Page 324

Settled ever since the case of *Powis and Andrews*, that a will cannot be set aside for fraud here, because where it is a will of personal estate, it may be set aside in the ecclesiastical court, and a will of real estate at law. *ibid.*

Not reading a deed to a person in the rough draft before the execution, nor in the engrossment at the time it was executed, is a badge of fraud. 327

E. making *T.* believe the grant of a stewardship was so drawn, that he might revoke it at pleasure, whilst *E.* had taken it to himself and his heirs; the court held, that *E.* having abused the trust reposed in him, and manifestly intending to get the estate into his own hands, the grant of the stewardship must be delivered up, and *T.* must have his full costs of suit. 332

Fraud is what is done in secret, and where there is a concealment from the party in a matter which concerns him in interest. 561

Frauds and Perjuries. See **Agreement.**

Free Bench. See **Dower.**

The father of the plaintiff's husband bought customary freehold lands, which were conveyed to him and *D.* and the heirs of the father, who dies, after devising the lands to his son in tail, who dies; living *D.* the plaintiff lays the custom for the whole as her free bench. Lord *Hardwicke* said, *this was a demand of customary dower out of the trust of a freehold estate, and dismissed her bill.* 525

It is a dying seised of the husband, and not a seisin during coverture, intitles the widow to her free-bench. 526

Freehold, things fixed thereto. See also **Matters controverted betwixt the Heir and Executor under Heir.**

Game and Game-keeper. See **Bond.**

AN unqualified person shooting a game keeper's dog will justify a judge in directing considerable damages. Page 192

Bonds taken for the preservation of the game, and to prevent poaching, are for the benefit of the obligor, as this sort of idleness leads to worse consequences. 193

There is no act of parliament which directs taking bonds in this particular case, but the acts which relate to the customs, and the act 5 G. 1. c. 15. against deer-stealing directs such bonds, so that the doing of it is not *malum in se.* *ibid.*

These bonds are not intended as a bare security that the obligor shall not offend for the future, but are by way of stated damages between the parties. *ibid.*

Fishing with an angling rod is not poaching, nor was it ever so esteemed. 194

Gaming.

A motion for further time to redeem a mortgage, and that it should stand as a security only for what was *bona fide* advanced, but forfeited as to what was won at play: Lord *Hardwicke* said, as Mr. *Fleetwood* in a former cause where he might have done it, did not insist on a redemption, the foreclosures could not regularly be kept open, but on the whole circumstances allowed three months. 467

The enforcing the gaming act is of great consequence to the public, and not confined merely to the interest of private persons. *ibid.*

Though gamesters call them *debts of honour*, yet this court thinks it false honour, and that the person who informs and discovers these practices has done a meritorious act. *ibid.*

Grandchildren. See **Exposition of Wills.**

A parent is bound by nature to support a child; but this has not been extended to grandchildren, and therefore not intitled to interest. 330

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Guardian. See Infants, Maintenance.

Though there be no cause depending, there may be an application to the court in the case of guardianship of children. 14

A testamentary guardianship is not assignable. *ibid.*

If a guardian purchases his ward's estate immediately upon his coming of age, though it carries suspicion with it, yet if he gave the full consideration, it is not voluntary, nor can it be set aside. 15

Habeas Corpus. See Certiorari.

A Habeas Corpus and a *certiorari* differ; that removes the body *cum causa*, and you declare *de novo* in the superior court; but on a *certiorari* you must proceed on the record, as it stands when removed. 317

Heir and Incestor. See Assets, Will, Specific Legacies.

The heir at law does not want an express intention to take by a will, though it is otherwise with regard to a deed. 151

An heir at law is as much at liberty to invalidate the will, as the devisee to establish it; and such a suit is to all intents a *lis pendens*. 174

If an heir conveys an estate to a stranger whilst there is a suit for establishing a will, and it is afterwards established, the grantee of the heir is bound. 175

If an heir at law in a suit to establish a will, prevails to set it aside, he shall have the benefit of the evidence in that cause against a purchaser *pendente lite*. *ibid.*

An heir must be charged in the *debet* as well as *debetur*, and before the statute of jeofails, it would have been error if otherwise; which shews he is to be considered as a debtor. 205

If judgment be by default against an executor, it can only be *de bonis testatoris*;

but if against the heir it may be *de bonis propriis*. Page 205

Though a person has an intention to disinherit his heir, yet if it was owing to fraud and imposition, this will fetch back and revert it in the heir. 327

An heir is intitled to his costs, for it is the law which casts the descent upon him; otherwise as to an executor, because he may renounce. 408

A bare intention, or even negative words, will not exclude an heir at law from insisting on a resulting trust. 566

A man by empowering other persons to dispose of his estate, disinherits his heir as much as by his own actual disposition. 567

Where a testator says, I will my heir shall sell the land, without mentioning for what purpose, he is not obliged to sell; but if he appoints his executor to sell, it is turned into personal assets, and leaves no resulting trust in the heir. 568

Matters controverted between the Heir, Executor, and Devisee. See titles Assets marshalled, and in what order Debts are to be paid, and Bonds.

All my freehold lands in the tenure of the widow L. and the residue of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, &c. or in any other thing wherefoever or whatsoever, I give to A. H. or her assigns for ever. *The court will intend an intestacy in favour of the heir at law, unless there is a clear intention to pass the real estate.* 102

Where an heir at law will bring a bill to set aside a will for insanity, instead of an ejectment, he shall pay costs if he fails. 424

Where an heir is brought before the court as a defendant, and an issue at law is directed to try the fraud or insanity of the testator though he fails in overturning the will, the court will not give costs against him, but very often allows the heir his costs. *ibid.*

Before the statute of fraudulent devises an heir would have had the aid of the personal estate in case of the real, but if there was no personal, is not intitled

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titled to a contribution from the devisee. Page 432

Heir. See **Bargains** catching.

Hotchpot. See **Custom of London.**

W. on his son's marriage settled 5000*l.* old and new annuities on himself for life, then on *W.*'s wife for life, remainder to his son for life, with remainder to his intended wife for life, with remainder to the issue of the marriage: *Not only so much as his estate for life in these annuities is valued at, but the whole 5000*l.* must be brought into hotchpot before the son can be admitted to a share of W.'s personal estate who died intestate.* 635

Implication.

TRUSTS by implication arise where one person pays the purchase money, and the conveyance is taken in the name of another; but the rule is not so large as to extend to every *voluntary conveyance.* 256

Incumbrance. See **Securities.**

A prior creditor who buys in a puisne incumbrance, though he did not give the full value, shall be allowed the whole; otherwise as to a trustee, agent heir at law, or executor, who shall be allowed no more than what they gave for such incumbrance. 54

Infant. See **Guardian, Distribution, Executor, under How to account, Witness, Maintenance, Answer.**

Children have a natural right to the care of their mother. 15

▲ School-boy contracts a debt of 59*l.* for Burgundy, Champaign, Claret, &c. with *G.* a victualler in the space of five months time; in a few days after he came of age, *G.* prevails on him to give a note for the 59*l.* without producing any account, or delivering him a bill. *The court upon the circumstances*

of the case decreed the note to be delivered up to be cancelled. Page 34

There is no difference either in law or equity between an infant of 16 or 17 and one turned of 20; the latter, if imposed upon, equally relievable with the former, for till an infant attains 21 he is considered as such. 35

If an infant takes up goods before, and gives a note for them after he comes of age, provided there be no fraud, it is good at law. *ibid.*

Where an unconscionable bargain is made with an infant before he comes of age and a note of hand is taken from him, immediately on his coming of age, the court on a bill brought even by the executor will order it to be cancelled: for attempting thus to substantiate such a bargain made with an infant during his infancy, is a principal ingredient with a court to relieve. 25

Where a mother secrets her children who are infants, service of a *subpoena* on her is sufficient, as she is the natural guardian of the children. 70

A child *in ventre sa mere* is *in rerum natura*, and is as much one, as if born in the father's life-time. 117

This court will grant an injunction to stay waste, in favour of an infant *in ventre sa mere.* *ibid.*

Though a witness be an infant, her tender years will not invalidate her evidence; for circumstances of distress make as great an impression on a young mind as an old one. 245

If an infant, who contracted a debt during his minority, shews his consent to it by confirming it after he comes of age, it will effectually bind him, tho' it was voidable at his election. *ibid.*

If a plaintiff who is of age does not reply, it is an admission of the facts in the answer; but an infant can admit nothing, and therefore his not replying does not affect him. 377

Where there is an application to the court to lay out part of an infant's personal estate in land, if he dies before 21, or does not approve of the purchase when he comes of age, the property will not alter. 413

Infants when of age are intitled to put in a new answer; and if they can, to make a better defence. 531

At

At law, the courts in some cases will admit the parol to demur, even where the suit is brought by the infant as demandant. *Page 531*

This court has in some few instances given an infant, where he was a plaintiff, a day, to shew cause, but it must be on extraordinary circumstances. *ibid.*

An infant is proper in applying to put in a better answer, where he might not be able to come at the same evidence when he is of age; as the fact he wants to examine to is of long standing, and the witnesses consequently very old, and may die before he arrives at 21. *532*

Indictment.

In an indictment for keeping a common bawdy-house, or gaming-house, though the charge is general, yet you may give particular facts in evidence. *339*

In an indictment of *barretry* the defendant is intitled to a copy of the articles, which are to be insisted on against him at the trial. *340*

Injunction. See *Mines, Waste, Merchants.*

The plaintiff through several mesne assignments, being in possession of a right originally in the city of London of supplying *Southwark* with water, prays an injunction to restrain the defendant from incroaching on his right, by raising engines, laying pipes, &c. and to have it established in this court: the defendant demurred to the bill, for that the plaintiff ought first to have established his right at law. Lord Hardwicke allowed the demurrer; as the chance there was of the plaintiff's right falling to the ground at law, was a strong reason for it. *391*

Insanity. See *Lunatic, Spiritual Court.*

In an issue on *non compos mentis* you must give particular acts of madness in evidence, and not general only, that he is insane. *340*

Insurance.

Whilst a ship is preparing for a voyage upon which it is insured, the insurer is liable; but if the voyage is laid aside, and the ship lies by for five, six, or seven years, with the owner's privacy, the insurer is not liable. *Page 359*
It is necessary the party injured should have an interest or property in the house insured at the time the policy is made out, and at the time the fire happens; and therefore after the lease of the house expired, the insured's assigning the policy does not oblige the insurers to make good the loss to the assignee. *554*

The term in the books that treat of insuring is *aversio periculi*, the intention being to avert any damages or loss the insured might sustain. *555*

Policies of insurance are not assignable in their nature, nor intended to be assigned from one to another person, without the consent of the office. *557*

Intention. See *Exposition of Words.*

A court of equity is more liberal than a court of law in construing words to make them agree with the intent of the party. *581*

Interest of Money. See *Administrator, Bonds, Annuity, Mortgage, Power, Ireland, Usury.*

A. by will in 1699, creates a trust term of 21 years for the payment of debts and legacies, to be paid within five years after his death, and by a codicil devises the same estates to trustees and their heirs to pay the wife during her life 300 *l.* per ann. and with the surplus profits his debts and legacies: the testator's widow did not die till 1735: the question was, whether a legatee for 20 *l.* and a simple contract creditor for 76 *l.* 9s. are intitled to interest upon the legacy, and debt, and from what time? It was held that interest on the legacy begun at the expiration of the five years, but on the debt from the time only it was ascertained by the Master's report, and confirmed in 1717. *108*

A legacy

A Table of the Principal Matters.

A legacy in it's nature carries interest, and there is no distinction between a reversionary estate and any other. Page 110

Lord *Hardwicke* declared he knew of no general rule, that on a trust created for the payment of debts, simple contract ones shall carry interest. *ibid.*

A gift of 300*l.* due upon a bond does not carry the interest incurred in the testator's life-time, because it was doubtful what it might amount to, from the uncertainty of the time the testator might live after making his will. 112

The court often decrees interest from the time the demand was liquidated, though the debt did not carry interest in it's own nature. 212

It is the rule of this court to allow no more than 4*l. per cent.* where the will does not mention interest on portions charged upon land, and has also been extended to the cases of legacies and portions charged upon personal estate. 343

Though there be no particular reservation of interest by a decree, yet there is a discretionary power in this court to allow it, upon special circumstances. 440

From 1725, the time Lord Chancellor *King* came to the great seal, the court have never directed more than 4*l. per cent.* interest, under a decree to account for personal estate. 523

Concerning interest upon mortgages, bonds, &c. which relate to *Ireland* and the colonies. note 1. 382

Tenant for life must keep down interest upon incumbrances; *secus* as to tenant in tail. See note upon this point, 416

Jointure. See Taxes.

If by any accident after the execution of a power there is an excess in the lands settled on the jointress, she shall have the benefit; by parity of reason, if there is a deficiency by inundation or casualties, she must acquiesce under it. 544

Jointenants and Tenants in Common. See Exposition of Words, Division. Devise under Will, Tenants in Common, Presentation.

Nothing but an actual alienation of a joint-tenancy can sever it, the bare declaration of one of the parties to a deed that it shall be severed, is not sufficient. Page 55

A joint-tenancy is undoubtedly no favourite of a court of equity, though otherwise at law. *ibid.*

A maxim in equity is *alienatio rei preferatur juri accrescendi*, but it must be actual, and not from implication only. *ibid.*

The words, share and share alike, have been held these 200 years to make a tenancy in common. 122

Lord Chief Justice *Holt* leaned strongly to a joint-tenancy, but it is not favoured in courts of equity. *ibid.*

The word *respectively* will separate an estate, and make it a tenancy in common. 123

On a bill for a partition between two joint-tenants, the plaintiff must shew a title in himself, and not alledge generally, that he is in possession of a moiety. 380

Ireland. See Outlawry.

Where the debt was contracted in *England*, but the bond taken for it in *Ireland*, to be paid at a certain time, and at 7*l. per cent.* it shall carry *Irish* interest. 382

Judge. See Canons.

It is a much greater reproach to a Judge to continue in his error than to retract it. 439

Lord Chief Justice *Hale*, in a manuscript treatise, lays it down, that external discipline of the church could not bind any man to submit to it, but either by force of the supreme civil power, where the governors received it, or by the voluntary submission of the particular persons who did receive it. 669

A Table of the Principal Matters.

Judgments. See **Securities, Mortgage, Bargain catching.**

Where a judgment is still standing out, and no satisfaction has been entered upon record, this court will not merely on a presumption from length of time decree it to be satisfied, especially as the plaintiff here might have pleaded payment at law, on account of its being an old judgment, under the statute for amendment of the law. *Page 45*

If a person in custody confesses a judgment, whilst his counsel is attending, it will not be set aside for duress. 193

An action of covenant brought, and an interlocutory judgment *quod recuperet*; before final judgment the testator dies, the executor confesses a judgment to a bond creditor, he may plead it in bar to a *scire facias* on the action of covenant. 386

G. H. in 1693, confessed a judgment, but it was not to take place till after the death of a woman who lived in 1726, the estate subject to this judgment descended to *J. H.* who mortgaged it to the defendant; and in 1721 became a bankrupt, five years before the judgment was to take place. *Lord Hardwicke held, the representative of the judgment creditor, and not the offeree under the commission, is intitled to redeem the mortgage, and to have the estate of G. H. exonerated out of J. H.'s estate, if sufficient.* 440

A judgment is a lien upon freehold lands; *secus* as to terms for years. 441. n. 3

Lord Hardwicke in *Stileman and Ashdown*, being of the same opinion he was at the former hearing, affirmed the decree he made on the 8th of December 1748. 608

After a bond debt is turned into a judgment, the creditor cannot in the lifetime of the ancestor bring any action upon the bond, nor against the heir, for it is intirely extinct; but he still obtains a great advantage, as the judgment binds the land, and gives him the preference to all bond creditors. 609

A court of equity will not oblige a judgment creditor to wait till he is paid out of the rents, but will accelerate the payment by directing a sale. 610

Jurisdiction. See **Court, Court of Chancery, and Spiritual Court,**

Justices of Peace.

The power of the court of chancery over justices of the peace is confined merely to the putting them in commission and cannot punish them for male-behaviour, which is the province of the court of King's Bench only. *Page 2*
Vagrants only, and not persons of rank are within the act 17 G. 2. c. 5. s. 20. that empowers justices of peace to take care of lunatics. 52

King. See **Attainder, Canons, Convocation, Lunatick, Prerogative.**

AN account with the King can be in the court of Exchequer only 56
F. seized of an estate in fee, devised it to his wife for life, and after her death to one *Haron* to sell, and in the first place to pay debts and legacies, and the residue to the plaintiffs. *Haron* who had a bare power is dead, and for want of heirs to *F.* the estate is escheated to the crown. *The bill was brought against the Attorney General on behalf of the crown, to have the will established and estate sold; the court of Exchequer might do this, as it is a court of revenue, but it cannot be decreed here, and therefore Lord Chancellor dismissed the bill.* 223

The father of *L.* had a mortgage in fee on Sir *William Perkins's* estate, who was attainted; the son of *L.* brought his bill to foreclose, and made the Attorney General a party; the court would not decree a foreclosure against the crown, but directed the mortgagee should hold and enjoy till the crown thought proper to redeem the estate. *ibid.*

The binding force of ancient canons over laymen was derived from the supreme legislative power being vested in the person of the Emperor. 656
In England it is far otherwise, where the King has but part of the legislative power. *ibid.*

Laity. See **Canons, Case, Convo-**
cation, Judge, Statutes, and Sta-
tute of Uniformity.

Ever since the Reformation, the rule has been, that when any ordinances have been made to bind the laity, as well as the clergy, in matters merely ecclesiastical, they have been either enacted or confirmed by parliament.

Page 657

Law-Books. See **Civil Law.**

THE *Practical Register in Chancery* is not a book of authority, but it is better collected than most of the kind.

22

Laws. See **Convocation:**

No new laws can be made to bind the whole people, but by the King with the advice and consent of both houses of parliament, and by their united authority.

654

Every man may be said to be party to, and the consent of every subject is included in an act of parliament; but in the case of canons made in convocation, and confirmed by the crown only, all these are wanting, except the royal assent.

ibid.

Leases and Covenants therein. See **Estate for Life, Estate for Years under Estate, Assignment, Tenant in Tail.**

The court of Chancery will not decree a specifick performance of covenants in dean and chapter leases of a long standing, but will be left to their remedy at law.

44

Lessees under deans and chapters preserve the same descriptions in their leases since, as they did before the restraining statutes, for fear of incurring the penalties.

45

R. N. the last life in a bishop's lease, agrees with **C. N.** to surrender this lease on a promise of the bishop of **H.**

to grant a new one for three lives, viz. for **R. N.**'s life, **C. N.**'s life, and the son of **C. N.** and in consideration of **R. N.**'s surrendering the old lease, it was agreed the new one should be in trust for the infant son of **C. N.** *The whole purchase money was paid by C. N. to the bishop*, but the legal estate was granted in the new lease to **R. N.** and his heirs, during his own life and the lives of **C. N.** and his wife. **C. N.** after the death of **R. N.** took upon him to dispose of it. **R. N.** by a deed-poll dated the day after the lease declares his intention to be, that **C. N.** and his son, should after his decease hold to them and their heirs during the remainder of the term; *Lord Hardwicke* held **R. N.** had a valuable share in the consideration of the new lease, having given up his interest in the old, and that having a right to declare the trust, *C. N. had his life only in the lease.*

Page 74

A lease for 11 years at 140*l.* rent, who had covenanted for himself, his executors and administrators, but not *assigns*, that he would not without the lessor's consent assign over the lease, becomes a bankrupt; **H.** the assignee under the commission, enters on the farm, sells off the crop and stock, pays the *Michaelmas* rent for 1739, and the day before the next rent-day assigns over the lease to **R.** The lessor brought a bill to oblige **H.** to keep the lease during the term. It appearing in proof that **R.** never ploughed or sowed the land, never resided on the farm, but occupied it rather as an agent, *Lord Hardwicke* held it to be a fraudulent transaction between **H.** and **R.** and decreed **H.** to answer the half-year's rent due at *Lady-day* 1740, and the assignment to be set aside.

219

Observations on covenants and provisions in leases not to assign, &c. note 2.

ibid.

The whole *nonine pence* for a lease to a tenant to prevent his ploughing up old pasture ground shall be paid, and not at the rate of 5*l.* per cent. only on the rent reserved, for the intention of it is to give the landlord some compensation for the damage he has sustained from the nature of his land being altered.

239

B. after

A Table of the Principal Matters.

B. after making his will, surrenders the college leases he had devised by the will, and accepts two new leases, and pays a large fine; the last was not sealed with the college seal till after the death of the testator. Lord Hardwicke decreed that the lease actually renewed after the devise of it, was a revocation of that devise, otherwise as to the lease not perfected for want of the college seal. Page 593

Where a testator expresses himself in the present tense, it relates to what is in being at the time of making the will. 597

If a testator who had devised an estate for lives surrenders it afterwards, and takes a new lease, it is a revocation. ibid.

A devise of a lease, and of the right of renewal, carries both the lease and the right. 598

Where a testator says, I give all my estate, right and interest I shall have to come in a college lease at the time of my death, though renewed after the will, it passes notwithstanding. 599

A republication of the will would not have altered the case, because the very thing itself was intirely annihilated. ibid.

Legacy and Legatees. See Executor and Administrator, Restraints on Marriage, Satisfaction, Will, Revocation of a Will.

A legacy does not vest in the legatee till the assent of the executor. 77

Where a legacy is a charge upon personal estate, this court will set apart a sufficient sum to answer it, though not immediately payable. 58

Where there are two executors, and a legacy is left to one for mourning for himself, his wife and children, he is not excluded, but shall have a moiety of the residue notwithstanding. 222

Where a first will charges real estate with legacies, and by a second there are general pecuniary ones, though not executed in form, yet the latter legacies will be equally a charge upon the land. 276

The personal estate vests in the executor, and no legacy can come out of it without his consent. 598

As long as the fund itself exists upon which a legacy is charged, though it devolves either upon the heir or executor, yet they take it subject to the charge. Page 605;

Specific Legacies. See Wills mentioned, &c. Civil Law.

General pecuniary legatees are to be preferred to an heir at law, *a fortiori* a specific legatee of land; for it is a rule of law, that every devisee is in nature of a purchaser. 437

Where the same specific thing is given by two codicils, it can only be considered as a repetition. The same rule as to legacies of the like sum, or of the like quantities or things, though given in different writings, unless it can be shewn it was the testator's intention to make them additions. 636

Legacies of greater sums, values or quantities, given by a last than by a first codicil, are not additional, but augmented ones. ibid.

Legacies of less sums or quantities, or values, given by the last than by the first codicil, are not additional, but ademption, or diminutions *pro tanto*. ibid.

Where another legacy is given for the same cause, though in different instruments, there shall not be a double legacy. 640

The gift of the residue which is *residuum verbis* the same in the first and fourth codicil, makes it manifest the testator intended to substitute one in the place of the other. ibid.

Legacies of Portions bequeathed, lapsed or extinguished.

A testator gives part of his stock in trade to R. T. provided he attains 21, but if he dies before 21, remainder over to the plaintiffs; he died before that age; the administrator of R. T. is not intitled to the intermediate profits from the testator's to the infant's death. 41

Thomas Condon by his will gives to each of his two daughters *Isabella* and *Diana*, 1000*l.* to be raised and paid to them immediately after the decease of his wife out of the rents, &c. of his manors, &c.

A Table of the Principal Matters.

£c. in *Yorkshire*, or by sale or mortgage with interest after the rate of 6 *l.* per cent. from the decease of my wife until the said sums shall be duly paid to my daughters, or their respective executors, administrators or assigns; and in case either of his said daughters died before him, then the survivor, her executors, &c. was to receive all the sums before devised out of his said lands to be raised, and the part of the daughter so dying shall not cease or sink into the estate, for the benefit of my heir, but shall remain and be raised for the benefit of my surviving daughter. *Page 127*

The testator died, and left only one son and two daughters, *Isabella* and *Diana*; after his death *Diana* married Sir *William Lowther*, and died in 1736. *Anne* the mother died in the year following; the husband brings the bill to have the sum of 1000 *l.* raised out of the estate charged: Lord *Hardwicke* was of opinion the 1000 *l.* ought to be raised. *128*

It has been determined where a legacy upon land depends on two contingencies, though one them doth not happen the legacy shall be raised. Where the postponing the time of payment of a legacy has been owing to the circumstances of the testator's estate, and not to the circumstances of the legatees, that is not so strong a case for a legacy's sinking into the estate, as where the postponing the payment of it has appeared to have arisen from circumstances on the part of the legatee. *ibid.*

An interence may be drawn in the plaintiff's favour from the direction that the legacy shall be paid to the daughters, or their respective executors, administrators and assigns. *ibid.*

T. H. devises copyhold lands he had surrendered to the use of his will, to his wife for life, and after his decease to his son *Stephen*, till the defendant his grandson attained the age of 23, and as soon as he attained that age gives it to him and his heirs, on condition that he pays *Elizabeth Hancock* 60 *l.* within two years after he attains 23, and in default of payment of the 60 *l.* then the testator gave *Elizabeth Hancock* a power to enter and receive the rents till the 60 *l.* was paid. *507*

The testator died soon after making his will; *Elizabeth Hancock* married the plaintiff and lived till the defendant attained his age of 23, but died within 2 years after he attained that age. Lord *Hardwicke* decreed the 60 *l.* to be raised out of the copyhold lands, and to be paid to the plaintiff. *Page 507*

Abatement and refunding of Legacies.

Where a legacy is given to an executor generally, for his care and pains, it makes no difference; for if there is a deficiency of assets, he must abate in proportion with the other legatees. *171*

In what cases a legacy shall or shall not be a satisfaction of a debt or other demand on the testator's estates. See Satisfaction.

S. by a codicil, without any date, gives 1000 *l.* a-piece to *Mary* and *Sarah Robins*; and if either die before their legacies are paid, the whole to the survivor; each of the legacies directed to remain in the executor's hands till legatees attain 21. *S.* afterwards enters into two bonds, one to *Mary* and another to *Sarah*, reciting he was desirous to provide for their maintenance; each of the bonds were in the penalty of 4000 *l.* for securing 2000 *l.* provided they marry in his life-time, with his consent, or in case they survive him. As the principal sums given by the bonds are upon two contingencies, they ought not to be considered as a satisfaction of the legacies under the codicil. *491*

A legacy to a daughter under the will of her father, was held to be satisfied by his giving her a marriage portion afterwards. *492*

A legacy left to a creditor is a satisfaction, if it is equal or exceeds the debt; otherwise if given upon a contingency. *493*

A Table of the Principal Matters.

Surplus and Residuary Legatee. See **Ex-ecutor**, and in what **Case** the **Ex-ecutor** shall be only a **Trustee** for the **Surplus**.

It is settled, that where a legacy is given to an executor for his care and pains, he is, as to the residue, a trustee only for the next of kin. *Page 46*

Ademption of a Legacy. See **Ademption**, **Satisfaction**.

Letters. See **Books**, **Merchants**.

The losing letters, which when written were not material, though they may become so afterwards, is no reflection upon a party. *75*

A second husband having, by letters in his life-time, declared he was willing the daughter of his wife should have her mother's whole fortune; these letters, as he is dead, are not to be taken as a bare hint, but an appropriation of the fortune for the benefit of the daughter. *181*

If a husband indorses a note given to him by the wife, as between him and the indorsee, it is good. *ibid.*

Libel. See **Contempt**.

Whether a libel be public or private, the method is to proceed at law; and this court has no cognizance of it, unless it is in the case of a contempt, where it is an abuse of their proceedings. *469*

Printing initial letters will not protect a libeller, for that objection has been long got over. *470*

Calling a person an affidavit-man is libellous, for it means a man who is ready to swear on all occasions, without any conscience of the fact. *471*

Printing a brief before the cause comes on is a contempt, as it is prejudicing the world with regard to the merits. *472*

If a printer prints anything that is libellous, it is no excuse to say, that he had no knowledge of the contents. *ibid.*

It is a mitigation of the printer's offence if he will discover the person who brought the libel to him. *Page 472*

Limitation of Terms for Years. See this title **Under Estate for Years**.

Limitation. See **Statute of Limitations**.

Limitation of Estates. See **Personal Estates**.

There is no authority can be produced where it has been held, that a limitation of personal estate shall be confined to a dying without issue living at the death of the *first taker*. *314*

If the court should admit of a distinction between chattels real and personal, it would introduce confusion. *ibid.*

London. See **Custom of London**.

Lunatick.

A person's keeping a commission of lunacy by him for several years, without putting it into execution, is a contempt of the court, and will be discharged with costs. *52*

The rules of judging here, and at law, in cases of insanity, are the same. *327*

A committee of a lunatick's real estate may cut down timber for repairs. *407*

An inquisition of lunacy is always admitted to be read, but is not conclusive evidence, for you may traverse it. *412*

Where, before an inquisition of lunacy, a person who was found a lunatick, has made a purchase, with the approbation of his only son; the court will not change the disposition that has been made of this sum of money; but the purchase will stand. *ibid.*

The court have allowed part of a lunatick's personal estate to be laid out in repairs, and even upon improvements of his real estate. *414*

After the court of wards was taken away by act of parliament, the jurisdiction over lunaticks and idiots reverted back to the court of chancery, to whom it originally belonged. *551*

A Table of the Principal Matters.

Maintenance.

nds, Baron and Feme, Po-
tions.

I court, upon *ex parte* applica-
ns, may allow maintenance for
ant, where no cause is depend-

Page 315

ne peril of a guardian in socage,
ie applies for maintenance. *ibid.*
venience in these applications is
lucement to persons of worth to
of the guardianship, where they
ne sanction of this court for every
they do on account of mainte-

316

ing a borrowing and a lending
case of a mortgage, the real
is considered only as a pledge,
e personal is liable in the first
but this rule has never been
l so far as to extend it to a pro-
in a settlement charged on real
for maintenance for a child du-
er minority.

444

it, in the case of an elder bro-
will direct the master to make a
provision for him, that he may
bled, as the head of the family,
e housekeeper, to maintain the
er.

447

Hanoys. See Evidence.

c. See under **Baron and Feme,**
ption, Agreements on Mar-
tee under Agreement, Trus-
debts, Creditor and Debtor.

rt will not judge according to
ules of law, on a gift of land
patrimonii prebenti.

202

n who makes addresses on a view
riage, and a reasonable expect-
of success, gives presents, and
y deceives him afterwards, the
ought to be returned, or the
f them allowed.

409

e made to introduce a person
o a woman's acquaintance, he
ed upon in the light of an ad-
er; and if he loses by the at-
must take it for his pains, es-
y where there is a disproportion
n the lady's fortune and his.

ibid.

. II.

E. B. by an agreement made on her fa-
ther and mother's marriage, was in-
titled to 6000*l.* Mr. *B.* just before his
marriage, signed a paper, whereby he
agreed that every thing which should
come to *Elizabeth* by her father's death,
should go to them for their respective
lives, and after the death of the sur-
vivor, to the heirs of the body of *Eliz-*
abeth by him begotten: The question
was, whether this agreement should
be carried into execution for the bene-
fit of the eldest son, or on his being
intitled to a very great estate under
the grandfather's will, and *B.*'s younger
children having no provision, the court
would contrive the paper so, that the
whole should go to them, or a provi-
sion, at least, made for them out of
this fund: As this was a limitation
to the heirs of the wife, it vested in
her only; and the husband consent-
ing, Lord *Hardwicke* decreed the 6000*l.*
to be settled on her younger children.

Page 474

A settlement after marriage is good,
where the husband was not indebted at
the time, and the wife, when married,
an infant.

520

Neither the husband, nor a person stand-
ing in his place, can have the wife's
fortune, without making a provision.

ibid.

Restraints on Marriage. See Forfeiture.

A father by his will says, I give the sum
of 1000*l.* to my only daughter *M. G.*
to be paid her at 21, or day of mar-
riage, provided she marry with the
consent of my executors; but in case
she dies before the money become pay-
able on the conditions aforesaid, then
I give the said 1000*l.* equally between
my two younger sons, and appoints
four executors.

16

M. G. married contrary to the directions
of her father's will, but all the execu-
tors were dead before the marriage:
M. G. held to be intitled to the 1000*l.*
under her father's will notwithstanding
the death of the persons whose
consent was necessary before the mar-
riage being an excuse *ibid.*

A mother by her will says, in case my
daughter *M. G.* shall marry before she
is 21, without the consent of my ex-

X x

ecutor,

A Table of the Principal Matters.

ecutor, under his hand first obtained, *that then she shall not be intitled to any part of the legacies as I have herein left her*, but that whole share shall be divided amongst my sons; and appointed J. G. to be her sole executor. P. 16
The executor renounced the executorship in the most formal manner, in the ecclesiastical court; and on his renouncing, T. took out administration to the mother, with the will annexed.

17

M. G. married without the consent of the executor, or administrator: The marriage is a breach of the condition, and the portion forfeited, for the word *executor* is descriptive of every person who shall be administrator, being a power not annexed to the office of executor, but independent from the rest of his duty as executor.

18

A. gives 2000 l. to Agnes his daughter, payable at her age of 21, or marriage, if she marries with the consent of his executors; provided if either of the legatees die before their legacies become payable, such legacy to be divided between the survivor of her brother and sisters. Agnes married at 15, without the consent of the executors. Mr. Justice Parker held it to be a devise *in terrorem*, and that the legacy is vested, as marriage, one of the contingencies, has happened.

184

Whether a condition be precedent or subsequent, if in restraint of marriage, the court have always put a favourable construction upon them, to prevent a forfeiture.

261

Where there is no objection to the person or estate of the gentleman who proposes, and the young lady is herself inclined to the match, trustees should consider themselves in the light of a parent, and readily come into a consent.

ibid.

Trustees saying in a letter, *we shall be obliged to consent*, for the happiness of the lady, will be construed a present consent.

265

In what cases the court will dispense with the want of circumstances in the performance of conditions in restraint of marriage.

264 note 1

An executor brings a bill for the discovery of the defendant's marriage, who demurs, for that if she was to disco-

ver what is asked, it would be a forfeiture of her legacy of 1500 l. as it is given conditionally if she marries with the consent of the trustees under the will. Lord Hardwicke allowed the demurrer as she cannot answer to the marriage without showing at the same time it was against consent. Page 392

A husband by will gave an estate to his wife whilst she continued a widow, with a limitation over to another, in case of her second marriage; the remainder-man brought a bill for the discovery of the second marriage, and she demurred, as subjecting her to a forfeiture. Lord Talbot over-ruled the demurrer, as it was not a condition, but a limitation over of an estate, and therefore could not properly be called a forfeiture.

393

Master in Chancery. See Account, Master's Report.

Where a cause is referred to a Master to take an account, the court looks on the reference as a subsequent proceeding beyond the bill and answer, and will dismiss the bill with costs to be taxed.

287

It being referred to a Master to take an account between, a mortgager and mortgagee under a bill of foreclosure, his report was confirmed in the year 1736. Lord Hardwicke dismissed the defendant's petition for a bill of review, as it appeared the defendant's agent, attorney and solicitor, attended the settling the account on his behalf before the Master, which bound the party.

533

Where the sum is large, and the mortgagee is forced to enter on the estate, he subjects himself to an account, but the master is not obliged for a small exceed of interest to apply it to sink the principal, nor is it an invariable rule, that in taking such accounts, he must make annual rests.

534

Master's Report.

Upon exceptions to a Master's report you cannot read affidavits made subsequent to it, notwithstanding the affidavits of the adverse party were filed but the evening before the report.

21

A bill

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referred to a Master for impertinence, he reports it pertinent; the defendant excepts generally, without specifying the parts of the bill which are impertinent; the objection was overruled, as being irregular; for though the exception was taken in formal manner, the party may go on it, without pointing out particular passages.

Page 182

the error in a Master's report is going to a party's not laying a material piece of evidence before him, the court will not direct him to review his report upon any other terms than the plaintiff's giving up his deposit.

408

after in taking an account may be a special matter, though he has no express direction from the decree to

621

1. See **Spiritual Court, Statutes.**

the ecclesiastical censures and punishment are both levied against identical offence, the rule of *nemo iniri debet pro eodem delicto*, is strong against allowing a double proceeding

672

infringements. See **Demurrer, Statute imitations, Fictio, and Pin-**

tion which materially concerns the merchants in general, will induce them to continue an injunction. 229
Merchant's copy book of letters has allowed to be read, where a person who has the original letters refuses to produce them.

611

relations with a foreign prince and government, do not concern the sale of merchandize.

612

refusal of attorney from one merchant to another, to get in debts, will not bind the person so deputed a merchant in the exception of 21 Jac. 1.

613

Mines. See **Purchase, Purchaser, and Purchase-Money.**

Where the crown has only a bare reservation of royal mines, they cannot grant a licence to any person to come upon another man's estate, and search for such mines; but when mines are once opened, they can restrain the owner of the soil from working them, and can either work the mines themselves, or grant a license for others to work them.

Page 20

If a person has only threatened to open mines, a plaintiff may certainly come into this court to restrain a defendant from doing it.

182

Mistakes. See **Baron and Feme.**

Bond of Obligation.

Mistakes and misapprehensions in the drawers of deeds are as much a head of relief as fraud and imposition. 203
The inattention or laches of a married woman, cannot hurt her right. 545

Modus. See **Tithes.**

A *modus* to take part of the tithes for the whole has always been held a void custom.

138

Money. See **Debit, &c. under Will, Real Estate.**

Where money agreed to be laid out in lands shall be taken as land. 307
3000*l.* was vested in trustees for the purposes following, *viz.* 2000*l.* thereof to be paid to the eldest son, and 1000*l.* for the benefit of the younger children, and agreed under articles before marriage the 3000*l.* should be laid out in land, and the estate so purchased shall be to the same uses, &c. and subject to the same conditions, which are declared concerning the 3000*l.* Decreed that the lands shall be taken as money, the laying it out upon real estate being merely to make the fund for the benefit of the children more permanent and secure.

188

Mr. D. on his marriage with Mrs. D. covenanted that his heirs, &c. should

X x 2

lay

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lay out 20,000*l.* in the purchase of lands to the following uses; to himself for life, then to the intent his wife should receive 800*l.* a year for her life as her jointure, then to his first and other sons in tail male, with remainder to his own right heirs. *Page*

452

Mr. *D.* died in 1723, without laying out the 20,000*l.* in a purchase, or leaving any issue: his heirs at law were *B.* his sister, married to Mr. *B.* and the plaintiff his nephew by another sister; Mr. *D.* was a freeman of *London*, and his widow became intitled to one moiety of that, and *B.* and his wife and the plaintiff to the other moiety. Articles of agreement were entered into between the next of kin and the widow, wherein it was covenanted, that 20,000*l.* *South-sea* annuities should be transferred to trustees, who should sell them, and lay the money out in land, and settle it to the same uses as were in the former articles; the annuities were assigned to trustees accordingly. Mrs. *B.* died, whereby the plaintiff became intitled as heir to all the real estate; but Mr. *B.* contended, that the subsequent articles had turned the money realized by the former into personal estate again, and that thereupon he became intitled to his wife's share as her administrator. *Lord Hardwicke of opinion the wife was not capable of changing the nature of her estate by articles, because under coverture and unable to contract.*

452

Before the wife could in this case have altered the property or course of descent the money must have been invested in land, and there she might have levied a fine of it, and given it to her husband; or upon coming into court and consenting to take this money as personal estate, and being examined as to such consent, it binds the money article to be laid out in land as much as a fine at law would the land, and she might dispose of it to her husband.

453

At law money so article to be laid out in land is considered barely as money, till an actual investiture; and equity alone views it in the light of real estate and therefore this court can

act upon it, as its own creature, and do what a fine at common law can upon land.

Page 453

Lord Hardwicke of opinion the articles in 1724 do not import any variation of this estate from real to personal, for it being agreed the 20,000*l.* should be transferred to trustees to buy land, to be settled to the same uses as in the articles of 1715, there is no doubt but this money is to be considered as realized, and the articles have made no conversion of the estate from real to personal.

454

The whole produce of the 20,000*l.* *South-sea* annuities is to be laid out, when sold, in the purchase of land, and not 20,000*l.* in money only, as all the parties who had any interest in the personal estate of *D.* agreed they should be transferred to trustees, to sell and lay out in land the money arising thereby.

ibid.

Monopoly. See Trade.

The grant from the crown for the sole making and vending of cards was one of the monopolies so frequent in *James the First's* time, and continued through all his reign, but did not last long in his successors.

486

Mortgage. See Deeds, Interest, Copyhold, Redemption and Foreclosure, Bill of Redemtion, and also Gaming, Securities, Attorney and Solicitor, Fraud, Master in Chancery, Agreement when to be performed in Specie, Assets, Counsellor, Ejectment, Baron and Feme, Annual Rents, Assets marshalled, &c.

A mortgagee, till he is fully satisfied, is not obliged to quit the possession of the estate to the purchaser of it. 2

A prior mortgagee, who has an assignment of a third mortgage as a trustee only, cannot tack the two mortgages together, to the prejudice of intervening incumbrancers.

53

The reason why a mortgage may be tacked to a judgment is, because a judgment creditor, by virtue of an *elegit*, may bring an ejectment, and hold up-

on

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on the extended value, and as he has the legal interest in the estate, the court will not take it from him. *P. 53*

A first mortgagee has the legal estate, and if he has a puisne incumbrance, a second mortgagee shall not redeem the prior, without redeeming the puisne at the same time. *ibid.*

Where a mortgagee has a bond likewise from the mortgagor, the heir must discharge the one as well as the other, because the moment he redeems the estate it shall be assets in his hands. *ibid.*

A mortgagee cannot have a decree for an account of rents for any of the years back, during the possession of the mortgagor. *107*

A devise of 200*l.* on a mortgage passes the principal only. *112*

The court will not allow a mortgagee more than his principal and interest, notwithstanding the mortgagor has agreed, he shall be paid for his trouble of receiving the rents. *120*

A mortgagee, where the mortgage was only 4 and $\frac{1}{2}$ per cent. compelled the mortgagor to turn the interest into principal at 5 per cent. at the end of every six months, and at the time the mortgage was paid off, insisted on an advance of six months interest over and above the interest which was due. The bill was brought for relief against the mortgagee, and the plaintiff was relieved accordingly, by the court directing the Master to take an account only of what is due on the original sum at 4 and $\frac{1}{2}$ per cent. and the plaintiff to pay the same rate of interest for any fresh money that shall appear to be due. *331*

An agreement to turn interest upon a mortgage into principal, must be done fairly, and on the advance of fresh money. *ibid.*

A mortgagee may refuse to part with the deeds till the money is paid, but ought not to deny an inspection in his hands when he has notice to be paid off. *332*

Though interest is in arrear when the mortgage is paid, a mortgagee shall not have interest for that interest. *ibid.*

Thomas Matthews gave the plaintiff at different times three notes, one for 450*l.* another for 250*l.* and the last for 150*l.* and expressed in each to be secured by

mortgage on my *Sicke-ball* estate; the drawer of the notes had before mortgaged the same estate to the defendant; the plaintiff takes in a prior mortgage to protect the sums lent upon the notes. *Lord Hardwicke held there was nothing to differ this case from the common one, and that the defendant shall be paid the money lent upon the notes in the first place, as well as the money due on the assignment of the prior mortgage. Page 347*

A fettered rule, that the prior mortgagee may tack a judgment to his mortgage, though subsequent in time to a second mortgagee, provided he has no notice of the second; for the maxim is, *prior in tempore, potius in jure.* *352, 354*

J. P. having married the daughter of *T. T.* who under his will was intitled to two houses in fee, and having borrowed 50*l.* of *W. H.* by lease and release in 1699, and a fine, conveyed these houses to *W. H.* and his heirs, until he should have received by the rents and profits thereof the 50*l.* with interest, and after payment by such rent of the 50*l.* then to the use of *J. P.* for life, remainder to his wife for life, last remainder to the heirs of *J. P.* *360*

J. P. lived till 1710, and dying without issue, the houses descended to *T. P.* his brother and heir at law, who conveyed them for a valuable consideration to *T. P.* dying soon after, *T.* obtained administration, and insisted on the equity of redemption, upon paying what remains due on the mortgage to *W. H.* *Lord Hardwicke held that the two houses devised under the will were a redeemable interest, and that no bar arises from the length of time. ibid.*

The mortgagee here was only in the nature of a tenant by *elegit*, and as soon as his principal and interest was satisfied, the estate ceased in *W. H.* and *P.* or his representatives might have maintained an ejectment; nor unless *H.* had continued in possession 20 years after the money had been paid off, could the statute of limitations have run. *362*

The plaintiff may come here for an account of the profits received, as in an *elegit* the consor has a right to see, if the consor, on the extended value, has received a satisfaction for his whole debt, and to have the surplus paid to him. *X x 3* *363*

In

In common *Welsh* mortgages, on tendering principal and interest, the person intitled may come into this court for a redemption at any time. *Page 363*

Where a mortgagee takes an estate, subject to a perpetual account, he will not be relieved from his own contract. *ibid.*

The plaintiff is intitled to redeem on the common terms, and not obliged to bring an ejectment for the possession, but shall have a decree for it here. *ibid.*

A mortgage is a debt by specialty, and the land is only regarded as a pledge for the money in this court. *435*

A mortgagee may take his remedy against the executor, or against the heir; but the election of the mortgagee does not vary the right as to the funds, or determine which ought properly to be charged. *ibid.*

A person who has two estates mortgages both to *A.* and afterwards one of them only to *B.* the first shall take his satisfaction out of that which is not in mortgage to the second mortgagee, though the estates descend to two different persons. *446*

Redemption and Foreclosure. See Stocks.

The heir of the mortgagor, on preferring a bill to redeem, need not bring the original mortgagee (where he has assigned) before the court, for the assignee, as standing in his place, will be decreed to convey. *39*

After a possession of a mortgagee for 25 years, the court decreed a redemption on the defendant's submitting by his answer to be redeemed. *140*

If during a suit to redeem the mortgagor assigns the equity of redemption, and there is a decree against him, the assignee is bound by it. *175*

Praying relief, where a mortgagee is made party to a bill, is the same as praying to redeem; and if on a reference to a master, to see what is due for principal, interest and costs, the plaintiff does not redeem the mortgagee, the court will at his application, dismiss the bill, which is equivalent to a foreclosure. *267*

P. a cestui que trust of a real estate, made a mortgage upon it in fee, and devises the equity of redemption to his son and

his heirs, subject to the payment of his debts, and died indebted by bond and simple contract; as this was a mortgage of the whole inheritance, and nothing remaining in the mortgagor, the bond creditor can have no preference, but must be paid *pari passu* with other creditors. *Page 290*

No instance where an equity of redemption has been held to be liable to the execution of a bond creditor, in the life of the mortgagor. *292*

Length of time pleaded in bar to a redemption of a mortgage, being made as long ago as 1713, the mortgagor's solicitor appearing to have settled an account in 1730, in order to pay off the mortgage; Lord *Hardwicke* held that would save the right of redemption. *333*

Tenant by the curtesy is no excuse, for it is of no consequence to a mortgagee who has the equity of redemption; if they do not make use of their right, they shall be barred. *ibid.*

The plaintiff's grandfather in 1689 mortgaged the estate in question to *Whiteheads*; they afterwards mortgaged it to *Cartwright* and *Heywood* and their heirs for 200*l.* who to secure the interest leased the estate to the plaintiff's father in *June* 1689, and to his assigns for 5900 years at 12*l.* a year rent for the three first years, and 10*l.* a year rent for the remainder of the term; and if at three years end the 200*l.* was paid, and interest, then the premises were to be reconveyed: receipts given sometimes for interest, and sometimes for a rent charge, the last in 1730, the 200*l.* lent was charity money, directed to be laid out in the purchase of lands in fee, and the rents to be applied for cloathing 24 needy housekeepers. In 1738 the plaintiff gave notice he would pay the money, but the defendant refused to take it, and insisted it was an absolute purchase, and so decreed by the Master of the Rolls; and on an appeal, Lord *Hardwicke*, being of the same opinion, affirmed the decree. *494*

Where a mortgagee by agreement, either in the mortgage deed, or a separate one, fetters the redemption, with a fraudulent design to get the estate, it will not avail. *495*

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In common mortgages the want of a covenant for repayment of the mortgage money is no bar to a redemption.

Page 496

Where a mortgagee has been in perception of the rents and profits for a considerable time, the court will not decree a redemption, as it would be making him a bailiff to the mortgagor. *ibid.*

Where there are two trials, and the last was at the bar, the court lays more weight on this, from the solemnity of it and the length of the examination, because the reason for directing a trial at bar is in order to that. Page 378

An original motion must be made for a new trial, and the court will not answer a petition for it, where the cause comes on upon the equity reserved. *ibid.*

Ne exeat Regno.

ON a motion to prevent the defendant's going out of the kingdom till he has put in his answer, the court ordered he should give security to abide by the decree that shall be made at the hearing. 66

There is no instance of a *Ne exeat regno* being granted where it is not a mere equitable demand, except where a wife sued in a spiritual court for alimony, and the husband threatened to leave the kingdom; and to aid that court, and out of compassion to her, it was granted. 210

New Trial.

The court will not grant a new trial upon a suggestion that the party was not apprized of a particular evidence, and therefore not prepared to give an answer. 319

A distinction was taken formerly between trials at bar and at *nisi prius*; but in the case of the *Queen and the Bailiffs and Burgeffes of Brewdly* eleven judges against one determined a new trial ought to be granted. 320

The intent of directing issues here is only to inform the conscience of the court, and therefore not tied down to the same strictness of verdicts as courts of common law. *ibid.*

A notice to the defendant before the trial, that the plaintiff will prove a person to be abroad, though it does not point out the particular place where, is sufficient for the defendant to be prepared to encounter this evidence. *ibid.*

Next of Kin. See **Executor** under **Where he shall be only a Trustee, Personal Estate.**

G. a brewer had issue by his first wife *Elizabeth*, who married without his consent to Mr. *Burnaby*, and by his second a daughter named *Frances*; and having a considerable real and personal estate, by his will gave the residue of his personal estate to any son he should have by his wife, at 21, and if no son, then to his daughter *Frances* at 21, or marriage; but if she died before either, then if his daughter *Elizabeth* should have a son, he bequeathed the said residue to such son as should attain 21, and if she had no son, then he gave the said residue to the defendant *Ekins*, subject to the payment of 4000*l.* to the daughter of his daughter *Elizabeth*. 473

The testator died, and his daughter *Frances* also an infant, and the plaintiff being intitled, when of age, to the residue, brought his bill. *ibid.*

The question was, whether the interest of the residue of G.'s personal estate, from the death of *Frances* his daughter to the time it will vest in his grandson, must be accumulated or whether it is an interest undisposed of, and goes to the next of kin of the testator. *Lord Hardwicke* was of opinion that the interest must accumulate, and is a part of the residue till the devise to the grandson vests. *ibid.*

Though not at law, yet in this court a man may die partly testate, and partly intestate; but when a whole residue is given, it is a contradiction to say any part of that estate is undisposed.

475
If

If a personal estate is increased by any event after the testator's death, it is part of the residue, and will pass as such, and so will the interest of that residue, for that interest is assets, and part of the estate. *Page 476*

Nonsuit. See **Trial**, **New Trial**.

If there is evidence a plaintiff is not apprized of, he may suffer a nonsuit, and on his coming back to this court for new directions, they would have ordered another issue at law, notwithstanding the non-suit. *321*

Note of hand. See **Baron and Feme**.

A note of hand at the beginning mentioned to be for 20*l.* borrowed and received; but at the latter end were these words, "which I promise *never* to pay." This is a good foundation for an *Assumpsit*. *32*

The indorsee of a note may recover against an indorser, though the original drawer was an infant. *182*

Though former indorsees might not pay a valuable consideration, yet if the last indorsee gave money for it, it is as to him a good note. *ibid.*

Notice. See **Mortgage and Tender of Money due thereon**, and **Register &c.**

A bill brought to redeem against the defendant, who had notice of the plaintiff's title, but bought of the Marquis of *Wharton*, who had no notice; the objection allowed for not bringing the representative of the Marquis before the court, or otherwise the *puisne* purchaser would be deprived of that defence. *139*

A purchaser with notice himself, from a person who bought without notice, may shelter himself under the first purchase. *242*

Where by a transaction foreign to the business in hand, a counsel or attorney employed to look over a title has notice, this shall not affect the purchaser. *ibid.*

Denying notice of the plaintiff's title at the time of the execution of the deed

or payment of the consideration money, is not sufficient; you must swear you had no notice at or before the execution. *Page 397*

Refusance. See **Requiescence**.

Oath.

See **Uxoris**, and **Evidence**.

A Quaker cannot be admitted to exhibit articles of the peace against her husband, upon her affirmation, as it is in nature of a criminal prosecution. *70*

In the case of articles of the peace, where the party complained of is not in court, an attachment for a breach of the peace goes on the oath of the complainant only. *ibid.*

The steward of a court swearing he never heard of an agreement between persons *at or before* the surrender of the copyhold estate, is an evasion, and a negative pregnant that he heard of it after. *100*

Orders. See **Defendant**, **Costs**, **Bill**, **Answer**.

An order for a cause to stand over indefinitely does not imply, that it is put off only to the next term. *2*

A representative of a person, who had obtained an order to tax a bill, can revive it only on the same terms, the undertaking to pay. *114*

To bring a defendant into contempt on an order of taxation, you must have a copy of the bill at his house, and the report of the sum at which the bill is taxed. *ibid.*

In regard to dismissing bills where the cause is set down on bill and answer only, where it is so set down after withdrawing a replication, it shall be discretionary in the court for the future to dismiss with forty shillings costs or costs to be taxed, or with no costs; and an order for this purpose directed to be fixed in the register's office. *288*

The

The parties interested in an order for the appointment of a receiver, take upon them to print it, with a recital of the material facts in the cause relevant to the order, and disperse it among the tenants: Some other parties insisted this was a contempt of the court. Lord *Hardwicke* held it to be no contempt; but said, at the same time, he did not approve of such practice *P. 408*

As the manner of drawing orders here is of long standing, Lord *Hardwicke* said, he would not alter the course of them, but wished they were framed with the same simplicity as orders made by the courts of common law. *489*

Outlawry.

There can be no judgment in chief at common law upon a default, either for want of appearance, or for want of pleading; but after seizure on a *capias utlagatum*, the remedy lies in a court of revenue. *23*

A *custodium* is the possession of lands belonging to an outlaw, granted to the plaintiff by the court of exchequer in Ireland. *408*

Papist.

THE statute of the 12th of Queen *Ann* does not in the case of a papist make the whole trust void, but only the term upon an avoidance of a living which is vested in the universities. *157*

A conviction of a recusancy cannot be given in evidence against a third person under 11 & 12 *W & M* against papists, but you must prove the facts. *65*

The plaintiff, whilst a papist, assigned an advowson to the defendant for the term of 99 years, and having conformed has brought his bill for a re-assignment of the term, suggesting he had only assigned it for himself in trust, and to avoid the penalties of the statute of 1 *Geo. 1* and 1 *W & M*. *155*

The defendant pleaded the statute of Ireland and perjuries in bar to the dis-

covery but by his answer admitted, that the advowson was assigned to him for the purposes charged by the bill.

Page 155

Lord *Hardwicke* held, the plea must be over-ruled, being coupled with an answer which admits the facts; and was inclined to think, if the defendant had demurred to this part of the bill, such a fraudulent conveyance would, at the hearing, have been made absolute against the grantor. *155 & 156*

The act of 12 *Ann*. does not, in the case of a papist, make the whole trust void, but only the turn upon an avoidance, which is vested in the universities. *157*

Papists on their conformity are freed from any penalties they might otherwise sustain in respect of their recusancy. *ibid.*

The protestant next of kin are only intitled to the profits in case of descents; for in case of a purchase or grant by a papist, they are void by the statute of 11 & 12 *W. 3*. *210*

Paraphernalia, See Settlement before Marriage.

A husband by will disposes of jewels which the wife was possessed of in his life-time, bought partly with her own, and partly with his money, to his brother, whom he made executor; the wife intitled to those which are given to the brother as her paraphernalia. *77*

A wife, with respect to her paraphernalia, has been considered in the nature of a creditor, and having a lien upon real estate. *78*

The value of the jewels makes no alteration. *79*

A wife has been admitted a creditor to the value of her paraphernalia upon a trust estate for payment of debts. *ibid.*

The husband's having the possession of the jewels makes no alteration, where the wife has worn them as ornaments of her person, whenever she was dressed. *ibid.*

Where a husband's personal estate is not sufficient to pay his debts a wife cannot set up any claim to jewels, rings, pictures, dressing plate, and other trinkets,

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trinkets, given her before marriage.

Page 104

Where there is no trust on real estate for payment of debts, a widow cannot come upon it at all events, to be satisfied her *paraphernalia*.

105

The wife is not barred of her *paraphernalia* by a devise of the use of all household goods, furniture, plate, linen, &c. for life.

217

Parliament. See *Latus, Latty, Judge.*

The acts of uniformity, &c. *since the reformation*, shew that the parliament have from that period been of opinion that the power of making constitutions in ecclesiastical matters to bind the whole nation was in them.

659

Clear from 25 H. 8. c. 19. that both the King and the clergy thought it necessary to have the authority of parliament for abrogating part of the ancient canons, and establishing such part as was to remain in force.

661

Parol Agreement. See *Agreement Parol.*

Parol Evidence. See *Evidence, Decree, Will, Agreement, Agreement on Marriage.*

M. P. gave her real and personal estate to the plaintiffs equally between them; and on the death of one of them, the whole estate to *J. U.* in tail; and for want of such issue to *R. U.* in fee, with a few pecuniary legacies; and charged her real estate with the payment, if the personal estate should not be sufficient; and by her will declared she gave all the rest and residue of her personal estate to her uncle *L. C.*'s three daughters.

372

The counsel for the residuary legatee offering to read the parol evidence of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of *L. C.* Lord *Hardwicke* said, *this was not a case where parol evidence can be read, though there were some things*

here which might make a judge wish to admit it.

Page 372

Courts of law and equity admit parol evidence in two cases only, to ascertain the person, where there are two of the same name, or where there has been a mistake in a christian or surname, and in resulting trusts relating to personal estate: as where an executor has a small legacy, and the next of kin claim the residue, there parol proof is admitted to ascertain who was to have it.

373

Lord *Hardwicke* declared he was not satisfied with Lord *Cowper*'s rule of admitting parol evidence in doubtful wills; and that Mr. Justice *Tracy*, who assisted Lord *Cowper* in the great case of *Strode* against *Russel*, in which there was an appeal to the House of Lords, was, at first, of the same opinion with him, but, on consideration, was clear the evidence could not be admitted; and this alteration in his judgment was mentioned in the House of Lords.

374

In the case of *Setwyn* and *Brown*, Lord *Hardwicke* said, he was of opinion, that parol evidence ought to have been admitted; and that even Lord *Talbot*, when he had heard the cause, had a remorse of judgment at the same time he rejected the parol evidence, but the House of Lords refused it, as of most mischievous consequence, and affirmed the decree.

ibid.

The testatrix's charging the real estate with the legacies, if the personal is not sufficient, shews her intention in one event totally to revoke the devise of the personal; and there being an alteration of her intention before she finishes her will, the construction is, she has altered her intention throughout, and the plaintiff is not intitled to any part of the personal estate, but the residue belongs to the three daughters of Mr. *L. C.* and Lord *Hardwicke* decreed accordingly.

375

Parson. See *Divine Service, Celebration.*

A parson can neither preach, administer the sacrament, or celebrate marriage, without a licence from the bishop; for the

the

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the canons of 1603 are exprefs as to that matter. *Page 499*

It is not necessary for a minister to have a licence from the bishop of the diocese for every particular case; but he may suspend him wholly where he is irregular, till he submits to perform his duty properly. *500*

Parsonage. See title **Presentation.**

A rector may cut down timber for the repairs of the parsonage house or chancel, but not for any common purpose. *217*

He is intitled to botes for repairing barns and out-houses belonging to the parsonage. *ibid.*

Parties. See **Statute of Fraudulent Debts, Assets, Courts of Law, Letters, Acquiescence.**

At law, if you join the heir and executor in an action, they may demur, otherwise in equity, for every person must be a party who is necessarily so. *51*

Where the representation is contesting in the spiritual court, a bill may be brought for a discovery of assets against the heir, without making an administrator a party. *ibid.*

A person who has a legal interest, need not in every case be a party, where the whole equitable interest is assigned over. *235*

Where a mortgagee in fee has made an absolute conveyance, with several limitations and remainders over, if a person brings a bill to redeem, he must make at least the first tenant in tail a party, or otherwise the decree for a redemption cannot be complete. *237*

If, at the hearing, a plaintiff waives the relief he prays against a particular person, the objection for want of his being a party will have no weight. *296*

On a bill for an account of fees, to establish a right, you must have all persons before the court who have any pretence to a right; for they will be bound by a decree here; otherwise as to a judgment at law, which will not bind the right of a third person. *ibid.*

In equity you may take exceptions for want of parties at the hearing of the cause or demur, but you cannot plead it in abatement at law, after you have gone upon the merits. *Page 510*

Where a party in a *first* cause has examined a great number of witnesses to establish a particular point, the court will never suffer him in a second to contradict what he attempted to prove in the first, as it must necessarily introduce perjury. *531*

Where one party sets up a title inconsistent with the title set up by another, though he fails in his own claim, yet he may appear to have a right to something under the other's claim, and in that case the court will not deprive him of it. *533*

Partners and Partnership. See **Account.**

Items in a partnership account, relating to the particular interest of a book-keeper, will not be supported in this court. *159*

Where one partner is out of the kingdom, the partner who is before the court shall pay the whole of the joint demand. *510*

Personal Estate. See **Baron and Feme, Real Estate, Words.**

A testator gives his only daughter the sum of 3000*l.* at her age of 18, or marriage, and directs trustees to levy and raise by mortgage or sale of his lands, together with his personal estate, as much as will pay the 3000*l.* but that it shall not be raised till 18, or marriage, out of the before mentioned estate, or land, *that it may not be a debt on his personal estate.* Lord Hardwicke held that the personal estate was excepted, and that the 3000*l.* is a charge on the real estate. *57*

Personal estate is the natural and proper fund for the payment of debts, unless there are exprefs words to exempt it. *58*

Where real estate is expressly devised for payment of debts, the personal is exempted; but if the real is not sufficient, the personal must be applied. *79*

A teller

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A testator says, as to the rest and residue of his lands, tenements and hereditaments, his will is, that the annual profits shall be equally divided between R. and S. and nothing said about the personal estate. By all the rules of grammar as well as law, the words *rest and residue* must relate to something that went before, and where the testator calls it by the name of real estate, can never be said to affect his personal.

Page 168

A limitation over of personal estate after the death of the first taker without issue, is generally void. 312

Courts of equity will carry the limitation of a personal chattel, or trust of it, no further than the judges have done in the case of legal limitations of terms for years. *ibid.*

A material difference between the profits of a real and personal estate; rents never can become part of the personal estate, but the profits of the personal estate are the estate itself. In the case of real estates, the thing itself is not disposed of, but descends till the contingency happens; personal estate neither descends or goes to the next of kin, but is vested in the executor. 476

Where trustees have a power of selling real estate, and turning it into money, or keeping it in land at their option, it will be subject to the same trust as the personal estate is applied to, whether sold or kept as real estate. 562

B. who was indebted to the plaintiff and others on bond, and seised in fee of lands in *Lincolnshire* and two other counties, and also possessed of personal estate, wills, that all his estate in the county of *Lincoln*, or a sufficient part, be sold as soon as his executrixes conveniently can, for the payment of his lawful debts and legacies and funeral, then gives several specific legacies and a picture and prints to *E. M.* and appoints *E. M.* and *D. M.* joint executrixes: Some time after making his will he adds these words to it, I give to them all my personal estate not herein before devised, and then executed it over again in the presence of three witnesses, whose names appeared under it. *The personal estate under B.'s will passed as a specific legacy to the ex-*

ecutrixes, and shall not be applied in execution of the real estate. Page 524

Though a real estate be devised to be sold, yet if a testator has done nothing to exempt the personal, it shall be primarily liable. 625

The rule is, personal estate shall be first applied, unless there are express words, or a plain intention of the testator to exempt it, or to give it as a specific legacy. *ibid.*

Plantations. See Colonies.

Plea. See Account, Defendant, Decree, Rule, Writ, Notice, Alien, Courts of Law, Special Pleadings.

A plea to a stated account. 1

A plea of a bill for the same matter over-ruled, where the last was brought by the plaintiff in a different right from what the former was. 44

A plea may be good for part, and over-ruled for part, but a demurrer must be good for the whole, or void for the whole. *ibid.*

A plea for not bringing the representatives of the personal estate before the court allowed, though suspected to be put in for delay merely. 51

A plea must first be removed out of the way, before a plaintiff can have an injunction to stay proceedings at law. 113

A plea of a bare title only, without setting forth any consideration, will not protect a defendant from giving an answer to the title set up by the plaintiff. 241

Where there is a plea which covers too much, it may stand for part and be over-ruled for part, otherwise as to a demurrer. 284

The defendant pleaded likewise a fine and non-claim, in bar of the title set up by the plaintiff: Lord *Hardwicke* over-ruled it, because the pendency of the suit here, as it was a proper matter of equity, has prevented the running of the fine. 389

No exception can be taken to an answer whilst a plea is depending, for that must first be removed out of the way. 390

On a plea of a purchase for a valuable consideration without notice of the plaintiff's

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plaintiff's title, it is sufficient to aver, that the person who conveyed was seised, or pretended to be seised, when he executed the purchase deeds; but where a purchaser sets up a fine and non-claim as a bar, he must aver that the seller was actually seised. *Page* 630

A purchaser's denying notice at or before the execution of the deeds is not sufficient; he must aver that he had none at or before the payment of the money.

ibid.

Portions or Provisions for Children.
See **Maintenance, Legacies or Portions vested, under Legacy;** see **Trust for raising Portions and Payment of Debts under Trust, Satisfaction, Vested Interest, Statute of Limitations, Baron and Feme.**

Ever since the case of *Parvlet versus Parvlet*, it has been the rule that where there is a portion to be raised out of land, if the person dies before the day of payment comes, it sinks for the benefit of the heir. 131

A reasonable distinction may be made from that case, between a time of payment that appears to have been derived from the circumstances of the person, and from the circumstances of the fund. 132

It is probable there may be some common lawyers who do not know, if a portion is charged on land, that it will sink in the inheritance, if the person dies before time of payment. *ibid.*

T. C. by will created a term of 100 years, in trust out of the rents or by mortgage to raise portions of 100*l.* for each of the daughters of his son *T. C.* payable at 18, or day of marriage, and 6*l.* a year for their maintenance till their respective portions became payable, with a proviso that his son *T. C.* may make a jointure of all or any part of the premises, and also a proviso that in case such person, who shall be next in remainder expectant on the term of 100 years, shall pay to the daughters of *T. C.* their portions of 100*l.* before or after the same are due, then the term of 100 years to cease.

T. C. had two daughters but no son, and left a widow who had a jointure of the whole premises; *E. C.* the grandson

of the testator by his second son is become tenant in tail under the will. *G. H.* the daughter of *T. C.* who married 18 years ago brought the bill to have her portion raised immediately.

Page 354

The portions cannot be raised in the lifetime of the jointress so as to affect her; for when *T. C.* executed the power, the estate arose out of the will of *T. C.* and is precedent to the 100 years term.

ibid.

The court in modern cases have thought it hard to raise daughters' portions in the father's life-time, and therefore have refused to do it: In still more modern cases, where the portion was large, the court have refused it, in favour of the remainder man. 356

Conveyancers now are grown so cautious as to insert negative words, to prevent portions being raised in a father and mother's life-time. 357

The maintenance here is a present charge upon the estate, and is not postponed till after the term comes into possession, so that maintenance runs on till then; and no harm can arise from mortgaging the reversion, as the arrears must be satisfied the moment the term comes into possession. *ibid.*

The defendant cannot redeem the term, and exonerate the estate, without paying interest for the portions from the time they became due. 358

Where a husband makes a voluntary assignment of the wife's portion, the volunteer stands in his place only: the same equity in regard to executors, and the same as assignees of bankrupts. 420

Where a term for raising portions is placed after an estate tail, which should have been before, this court will rectify the mistake. 457

Portion not only implies a fortune out of the father's estate, but may also relate to what the wife brings with her in marriage, and answers to the word *dos* in *Latin*. 522

Power and Execution thereof. See **King, Portion, Jointure, Taxes.**

A husband by marriage articles and settlement had a power to dispose of a reversionary interest in an estate, in such proportions

proportions as he should think fit among the issue of the marriage: he by will delegates it to his wife, to dispose of in such shares as she pleases between his son and daughter. *This is like a power of attorney*, and not transmissible to a third person, but could be executed by the husband only. *Page 88*

G. W. having a power to charge his wife's estate with 2000*l.* gives by his will 500*l.* a-piece to his two sisters, and dies in debt to the plaintiffs: considered as the personal estate of G. W. and where there is a general power reserved to a person for such uses as he shall appoint; this makes it his absolute estate, and gives him such a dominion over it as will subject it to his debts. *172*

Though a power to dispose by appointment of a reversion in fee be not made use of, yet it shall be assets to satisfy specialty creditors. *ibid.*

A power in trustees of raising portions by rents, or by mortgage, is no reason for postponing the raising, in order that they may make their election. *353*

Where there is a power of charging land with a gross sum, it imports interest of course. *358*

A wife in case she survived her husband, and there were no younger children, had a power of disposing of 4000*l.* by deed or will executed in the presence of three witnesses; and this sum was a charge on the real estate of the husband. Before her second marriage, she, by articles executed in the presence of two witnesses only, appointed 2000*l.* out of the 4000*l.* to be for the use of her intended husband; the remaining 2000*l.* she disposes of by will, but does not execute it in the presence of three witnesses. Lord *Hardwicke* held, that the articles were a good appointment of the 2000*l.* for the benefit of her second husband. *414*

Though the appointment here was inaccurately expressed, and in an informal manner, yet, being executed for a valuable consideration, this court will supply the defect. *415*

The will under which the 2000*l.* is given being a voluntary disposition, as it has not pursued the power, by being executed in the presence of three witnesses, is a void appointment, and sinks into the real estate. *ibid.*

Whoever takes under a power, takes from the grantor, and not from the power itself. *Page 565*

Nothing is more certain in law than this, that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the person who executes it. *661*

Power of Revocation. See **Revocation**.

Possibility.

In equity, notwithstanding a doubt of Lord *Cowper's* in the estate of *Jacobson* versus *Williams*, 1 P. W. 382. it is now very well known that a possibility may be both released and assigned. *420*

Where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life-time of the first devisee, yet, if real, his heir, if personal, his executor, will be intitled. *621*

Possession, See **Statute of Limitations**.

Courts of law as well as courts of equity will make a strong presumption in favour of a possession of 21 years. *67*

Presentation to a Church or Chapel.

Where there are several *cestui que trusts* of a presentation, and they do not all agree, there can be no nomination. So in the case of joint-tenants before severance, they must all agree or no act can be done. *483*

Where there are parceners in an advowson, who cannot agree in one person, the court will direct them to draw lots who shall have the first presentation. *ibid.*

Presumptions in Equity. See *178*.

Prints and Engravings. See **Statutes**.

Process. See **Contempt, Infants, Attachment, Defendant**.

Where an attachment has issued against a person, and the sheriff takes a bail-bond

bond for his appearance, and delivers it to the plainiff, the court will discharge a rule made upon the sheriff to shew cause why he does not bring in the body; for the plaintiff is not without remedy; as he may move on a *cepi corpus* returned for a messenger to the county where the person lives.

Page 507

Prochein Amp. See **Infant.**

Purchase, Purchaser, Purchase Money See **Agreement, Statute of Struds and Perjuries, Guardian, Mortgage, Mines, Father and Son, Plea, Trust.**

Where a purchaser has given a full value for an estate, the mistake or ignorance of some of the parties to a conveyance of their claim under a marriage settlement shall not turn to the prejudice of a fair purchaser. 8

In a grant of an estate by the crown, there was a reservation of all royal mines; the defendant agreed to purchase this estate of the plaintiff, but refusing afterwards to compleat his purchase, the bill is brought to carry the agreement into execution; on a reference to a Master, he reported it was probable there are such mines, and therefore the plaintiff cannot make a good title. 19

On exceptions to the report, the court allowed them, and said as there never had been an exertion of this right in the crown in a single instance since the grant, and no possibility there ever will, it would be of mischievous consequence to admit it to be an objection to a title. *ibid.*

T. S. devises all his real and personal estate to G. his heirs, &c. charged with the payment of his debts; the plaintiffs who are bond creditors, never asked for their principal, but received their interest regularly for 16 years of G. the executor, who during this interval made several sales of the testator's estate; it was held by the Master of the Rolls, that the bill brought by the bond creditors shall be dismissed, and a purchaser shall not be disturbed after a quiet possession of 16 years. 41

A settlement, though made after marriage, yet being in consideration of a portion that was paid at the time cannot be impeached by subsequent creditors. Page 479

Where a purchaser has an advantage by the dropping in of lives, the court will direct an inquiry, what interest was proper to be paid by him on that account. 489

The dropping in of lives on estates in the West of England is not considered as accidental, but as part of the annual profits of the estates. 490

If the purchaser under a private contract does not pay the purchase money at a time fixed, he will be chargeable with interest, as he must bear any loss; so so likewise will he be intitled to any profits that arise from the estate. *ibid.*

A purchaser made an objection to a title for want of a deed, which had been inrolled at a publick office, but could not be found; a copy of it taken in 1632, attested to be a true one by five witnesses, produced in court; Lord Hardwicke was of opinion this would have been sufficient, even without an attestation. 541

Real Estate. See **Personal Debts.**

WHERE money is given to be laid out in lands, and when bought to be settled on such and such persons, on a bill brought here the court is to direct a purchase, and the profits of the money to go as the land itself, till purchased. 369

Where there is a direction by a will to purchase a particular estate, which is afterwards swallowed up by an inundation, the money so devised shall not go to an executor, but as the rents would have done when the land was purchased. *ibid.*

Antiently they were so tender of landed estates, that the sheriff could not even in cases of the crown extend the lands of the debtor if his chattels were deficient, and so could be made appear to the sheriff. 435

Where

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Where real estate is given to a devisee of personal for the payment of debts, it is assets. Page 566

Receiver. See **Statute of Limitations.**

The court has not a jurisdiction to appoint a receiver unless a cause be depending. 315

The case of ideots and lunatics has been insisted on as a similar case; but the jurisdiction which the court exercises with respect to them, is a particular one, and therefore not like the present. *ibid.*

Recognisance. See under **Securities, &c.**

Recovery. See **Common Recovery, Estates in fee-tail.**

Redemption. See **Mortgage.**

Equity of redemption may be conveyed by bargain and sale. 15

Register Act.

The plaintiff, a judgment creditor, upon an estate in *Middlesex*, prays to be let in upon it preferably to the defendant a mortgagee of the same estate, on a suggestion he had notice of the judgment before the mortgage was executed. The judgment was entered on the 12th of *March* 1733, but not registered till the 12th of *June* 1735; the mortgage was made the 24th of *May* 1735, and registered *June* 2, 1735, There being only a defendant's confession of notice proved, in direct contradiction to his answer, and contrary to a positive act of parliament made to prevent perjury; Lord *Hardwicke* decreed, so far as the bill seeks to postpone the defendant's mortgage, it should be dismissed with costs. 275

The register act is notice to every body, and the meaning of it was to prevent perjury proofs of notice or not notice. *ibid.*

It is only in cases of fraud this court have broke in upon the act, though

one incumbrance was registered before another. Page 275

Apparent fraud, or clear notice, would be a proper ground of relief, but suspicion of notice, though a strong one, will not justify the court in breaking in upon an act of parliament. 276

Rehearing.

A cause on a rehearing must be opened as a case. 50

Lord *Hardwicke* thought a defendant making a usual deposit on petition for a rehearing was a great hardship on a plaintiff, and not an adequate compensation. 138

You must make a decree complete against a defendant, though he has made a default, before you can petition for a rehearing. 152

Restraint on Marriage. See **Marriage.**

A term for years created in a marriage settlement to pay if one child 6000*l.* if two 6000*l.* to be equally divided, and if three or more 8000*l.* to be equally divided, and to be paid at 21, or marriage, provided if any of the younger children should marry in the father's life-time without his consent, and after his death without consent of the mother, such child should forfeit his or her said intended portion, to be distributed amongst the rest at the age of 21, or marriage, with such consent; with a further proviso, that if any such child should marry without such consent, or die before 21, or marriage, with consent, the portion to be divided amongst the survivors at 21, or marriage, with consent. *Frances*, one of the daughters married with Mr. *Bendish* without the mother's consent; and in the cause before Lord *Talbot* he declared, she was not intitled to any share of the 8000*l.* another daughter died after the decree before 21, or marriage, whereupon Mr. *Bendish* in the right of his wife, who is 21, applied for her distributive share of her sister's contingent portion. Lord *Hardwicke* was of opinion the words under the marriage settlement, such child as married without the father's consent should forfeit

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suit her said intended portion, extended to the whole interest each child might expect under the settlement whether certain or contingent. Page 584

Revocation. See under *Will, Revocation of a Will*, and under *Estate Lease for Years*.

Rule. See *Bill, Decree, Depositions, Appeals, Case, Executor, Defendant, Court of Chancery, Insanity, Parties, Demurrer Plea, Writ of Habeas corpus*.

Nice distinctions in cases are to be avoided, for the more general a rule is, the better. 41

General rules ought to prevail, though in the case of creditors themselves. 43

It is not a general rule to set aside every purchase made by a trustee of a part, or of the whole of a trust estate, but must depend upon circumstances. 59

It is an established rule now, that if you elect to proceed at law on coming in of the answer, your suit here must be dismissed, but on dropping that part of the bill which prayed relief, the court allowed the plaintiff to proceed at law. 85

Where debts and legacies are by a will directed to be raised by rents and profits, or by leasing or mortgaging of the land; this restrains it merely to a payment out of rents, and the court cannot decree a sale. 105

Lord *Hardwicke* recommended it to the parties to apply for a private act of parliament to obtain a sale of the testator's real estates. 106

Where there is a dispute as to boundaries, or unity of possession, a defendant must set forth how he is intitled. 112

A party who is at liberty to surcharge and falsify, is not merely confined to errors in fact, but may take advantage likewise of errors in law. *ibid.*

You may at the bar pray a particular relief, though by your bill you have prayed a general one. 141

Whoever comes here for an account of rents and profits, prays a discovery as incident to it, and for that reason a

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defendant cannot demur and plead to the same matter. Page 282

A co-defendant's admission to the advantage of the plaintiff, will not make his case better. 333

Where in a criminal prosecution the prisoner to strengthen his character enters into particular facts to support it, the prosecutor may likewise examine to particular facts. 339

Where the general life or conversation is in issue, the person must be prepared to invalidate that evidence, otherwise where it comes in collaterally. 340

If the plaintiff produces the order for a *subpoena* to rejoin, and an affidavit of some of the parties being out of the kingdom, the court will not dismiss his bill for want of prosecution. 604

Though a bill has been dismissed for want of such order and affidavit, yet upon producing them afterwards, and payment of costs out of purse, the court will retain it. *ibid.*

On motion to retain the bill, the plaintiff must shew that the order for the *subpoena* to rejoin was dated before the notice to dismiss. *ibid.*

Satisfaction. See *Trusts for raising Daughters' Portions, &c. and Payment of Debts, Legacy, Portions, Redemption, Conveyances*.

FIVE hundred pounds given in a testator's life-time, is a satisfaction for the same sum left in his will. 48

Where a less sum is given under a will than under a settlement, it is not a satisfaction of a greater. 58

Though it is a rule, that a legacy greater, or as great as the debt, shall be taken to be a satisfaction, yet where there is a presumption the testator's intention was otherwise, the court in late cases have leant against the rule so far as to hold it not to be a satisfaction. 301

By a conveyance on the 19th and 20th of February 1694, made on the second marriage of *William Lord Eland*, eldest son of *George Marquis of Halifax* with *Lady Mary Finch*, there was a term of

Y y

500 years

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500 years created, charged on all the lands in *Nottinghamshire* and *Yorkshire* comprized in the marriage settlement, in trust that in case there should be a failure of issue male of this marriage, the trustees after the commencement thereof should raise, if but one daughter 20,000*l.* if two or more 25,000*l.* equally to be paid to them at their age of 16, or days of marriage, if more daughters than one to have 200*l.* a-piece maintenance till 12, and afterwards 300*l.* per ann. to be paid at *Michaelmas* or *Lady-day*, which should first happen after the commencement of the term; provided, or in case lands of inheritance shall descend to the daughter from Lord Eland of as great value as the portions, then the 500 years term shall cease. Page 458

Marquis George by a conveyance of the 1st and 2d of *March* 1694, did in consideration of his name and family, and to support the same, in case neither he nor his sons should leave any issue male, settle the said premises on *Sir George Saville* for 99 years, if he lived so long, and to his first and other sons in tail male, with several remainders over. 459

Marquis George being likewise seised in fee of several estates in other counties, and the reversion in fee of divers manors on the death of the now *Marchioness Dowager of Halifax*, and of several fee farm rents on the death of *Catharine Queen Dowager*, made his will *March* the 17th 1691, and thereby gave his house at *Acron* to his wife for life, and after her decease to Lord Eland and his heirs; and she says, *As to all my lands not comprehended in the settlement made on my son's marriage, I give them to Lord Eland and the heirs of his body, and for want of such issue, to my daughter Stanhope.* *ibid.*

Marquis George died without any other issue male than Lord Eland, who proved the will, and being seised under the will as above, by lease and release of the 17th and 18th of *May*, 1695, declared the uses of a recovery of lands in the counties of *Northampton*, *Derby*, *York*, *Nottingham*, *Middlesex* and *Surrey*, to be to him and his heirs: and by lease and release of the 5th and 6th of *July* 1695, *Marquis*

William settled the same lands to himself for life, and after his decease to the use of such person and for such estate, as he by any writing in the presence of three witnesses, or by his will signed in the same manner, should declare, &c. and in default of such issue to his daughters and the heirs of their bodies; and in default of such issue to Lady *Stanhope* and the heirs of her body; and in default of such issue, to the right heirs of *Marquis George* for ever. Page 460

Marquis William by a codicil dated 20th of *August* 1700, reciting the recovery, devised all his said lands to his executors for 500 years, on trust to raise, in case he had no son, the sum of 500*l.* a piece additional portion for each of his daughters, to be paid at 16, or marriage, and subject to the term devised the said lands to his first and other sons in tail male, and in default of such issue, to remain to such use and for such estate as are thereof declared by the release of the 6th of *July* 1695. *ibid.*

On *May* the 31st 1700, *Marquis William* died without any issue male, but by his first Lady had issue Lady *Ann Bruce*, and by his second Lady *Effix*, Lady *Dorothy* and Lady *Mary Saville.* *ibid.* *Sir George Saville* after *Marquis William's* decease entered on the lands in *Nottinghamshire* and *Yorkshire*, and received the rents due at *Michaelmas* 1700, and has ever since paid the maintenance of *Marquis William's* three daughters, till the *Lady day* next before they arrived at their ages of 16 years. 458

Mr. Justice Tracy held that the lands of which *William Marquis of Halifax* was seised in fee, and devised to his daughters in tail, were not such an estate of inheritance as will be a satisfaction of the portions for his daughters by the second wife, because they claim these lands by purchase, and the proviso in the marriage settlement restrains the satisfaction, to lands coming to the daughters by descent from their father. *ibid.*

The valuation of the lands descending to the daughters from their father, must be made according to the value of the lands at the time of the descent; for

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till the valuation made it cannot be known whether they are a full or a partial satisfaction. Page 461

The lands descended from Marquis William to his daughter in tail, are not such an estate of inheritance as is within the meaning of the proviso; for such an inheritance was intended as is of certain value, an estate of inheritance in fee simple. 462

The reversion in tail expectant on the deaths of Lady Dowager Halifax, and the late Queen Dowager, are not such estates of inheritance descended from Marquis William as are within the intent of the proviso. 463

Lord Chief Justice Pratt, Sir Joseph Jekyll, and Lord Chief Justice King, delivered their opinion in court, which agreed with Mr. Justice Tracy's, and Lord Macclesfield concurring, gave judgment accordingly. 464

In most cases a father will be presumed to have paid the debt he owes a daughter, when in his life-time he gives her a greater sum than he owed her. 522

Scandal and Impertinence. See Depositions.

Securities, Judgments, Statutes and Recognisance. See Bonds, Incumbrances, and Mortgages.

None but a *bona fide* purchaser of a puny incumbrance, without notice of intermediate ones, can tack it to a prior. 53

Separate Maintenance. See Baron and Feme, Agreement on Marriage.

Lord Rivers by will gave an annuity of 50*l.* to the plaintiff, who afterwards in 1726 married the defendant Fitzee; in 1728 they agreed to part; by a deed of separation the husband covenanted to allow her 14*l.* per annum out of his own estate, and 24*l.* more to be paid quarterly out of the annuity of 50*l.* and 12*l.* a year to his daughter by the plaintiff for her maintenance, to be paid quarterly. The bill is brought against the husband, and Stephens a creditor of his, since the execution of the deed of separate maintenance, to have the fruits of that deed performed. *Lord Hardwicke decreed*

according to the prayer of the bill as against the husband; and as to Stephens, that he should not release his claim upon the annuity till the plaintiff had paid him his debt. Page 511

A. intitled to 500*l.* marries whilst an infant, the husband by deed after marriage agrees the 500*l.* shall be to her separate use for life, and after her death to the issue of the marriage; in the deed was a proviso, empowering the trustee to lend a part, or the whole, to the husband; he lent him the 500*l.* and in 14 months after he became a bankrupt; the trustee brought his bill to be admitted a creditor. Lord Hardwicke decreed, *he should come in as a creditor under the commission for the money he paid to the husband.* 519

In separate maintenances the court must be directed by judicial determinations, and not by what they think of them in their private judgment. 560

Sentence in the ecclesiastical Court. See Spiritual Court.

Sequestration, see under Decree.

After goods or a real estate are seized upon a sequestration for want of an answer, the plaintiff may still proceed, till he has got the bill taken *pro confesso.* 23

A sequestrator is not intitled to 6*s.* 8*d.* a day as a stated fee. 542

Settlement before Marriage.

Where a husband by a settlement before marriage was obliged to do a particular thing for the benefit of the wife, and he did a thing equally satisfactory, the court will presume a satisfaction by implication. 632

A wife, who by articles before marriage is by express words barred of every thing she could claim out of her husband's personal estate, by the common law, custom of London, or otherwise howsoever, has no right to paraphernalia. 642

Settlement after Marriage. See Agreements on Marriage.

A husband who had 1733*l.* stock devised to him after marriage, vests it in trustees for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children.

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The settlement is void both as to creditors before and after the marriage, and the trust-estate was decreed to be sold, and applied to the payment of the husband's debts. Page 600

Such a settlement good as against a father after marriage, and against a voluntary conveyance. *ibid.*

Solicitor. See Attorney, Master in Chancery.

South-sea or other Stock.

The person whose name is entered in the *South sea* company's books is, with regard to them, the proprietor. 141

Brokers very often transfer stock without the principal's being so much as mentioned, and yet he may maintain an action against the person to whom the stock was transferred. 394

Special Pleadings. See Courts of Law, Plea.

In a plea of conviction for a capital offence, this court must judge with equal strictness as if it was a plea at common law. 399

Saying that *A.* gave a mortal wound to *B.* of which he died, without mentioning in what part *B.* received the wound is bad: so saying that *A.* was tried at *Galloway* assizes, without saying the persons who tried him had a commission of gaol-delivery, is also bad. *ibid.*

In a proceeding at law, on a joint demand where one of the creditors will not join in the action, i. e. summoned and severed, and the other has judgment *quod sequatur solum.* 510

Where an action is brought against two joint debtors, and one only appears, the creditor may have judgment for his whole debt against the person appearing, and by default against the person who does not appear. 511

In pleading there is the same strictness in equity as in law. 632

Specific Bequest or Legacy. See under Legacy.

Specific Performance. See Agreement when to be performed in specie, and when not, under Agreement.

Spiritual Court. See Baron and Feme, Clandestine Marriage, De-murrer, Distribution, Statutes, Maxims, Statute of Uniformity.

The spiritual court, in cases of controverted wills, appoint an administrator *pendente lite*, to take care of the estate. Page 286

Where a person, whether he is heir at law, or next of kin, or any other man whatsoever, keeps possession of the testator's real or personal estate, such an administrator is intitled to bring ejectments for the recovery of the possession. *ibid.*

Lord *Hardwicke* thought it an absurdity that a will set aside at law for the insanity of the testator, may still be litigated on account of personal estate in the ecclesiastical court, and expressed a wish the legislature would find a remedy for it. 378

If a proper suit had been instituted in the ecclesiastical court in relation to the validity of a marriage in the lifetime of the pretended husband, and a sentence is given against the marriage, that would have bound every body; because it is final and conclusive, as being the proper jurisdiction in cases of this nature. 388

It is to be wished indeed, that the proceedings in all courts were uniform; but at present the ecclesiastical court, which is the law of the land, frequently determines contrary upon the same facts. 389

Where the ecclesiastical court have given their consent the husband should have the wife's portion, this court has granted an injunction to stay the proceedings *there*, because they will not suffer the husband to take the wife's portion, till he has agreed to make a reasonable provision for the wife. 420

The principal registers in the prerogative-office disagreeing about the appointment of a clerk, the deputy register nominated one *Abbot*, who for a twelve-month officiated, and received the fees amounting to 500*l.* Lord *Hardwicke* held, as he was an officer *de facto*, he had a right to the stated fees, and to retain them without account; and dismissed the bill as against him with costs. 483

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The right of nomination of a clerk to the register is in the surviving grantees, in the grant of the late archbishop Doctor Wake. *Page 483*

Lord Hardwicke directed the two registers to draw lots, who shall first nominate a clerk, to fill up a late vacancy. *ibid.*

If there were a long course of precedents of a proceeding by ecclesiastical censures against lay persons marrying clandestinely, it would be of great weight in a case of this nature though a few instances would not. *670*

In *Mattingley and Martins, Jo. 257.* it was resolved that if any person marry without publication of bans or licence, they are citable for it into the ecclesiastical court, and no prohibition lies. *ibid.*

Otherwise lay persons contracting such marriages would, without such a jurisdiction in the spiritual court, have been unpunished till the statute of *W. 3.* was made. *ibid.*

The 18 *Eliz.* which concerns the mothers, &c. of bastard children, inflicts a temporal punishment, to prevent undue charges on parishes; the spiritual court punishes it by penance, as it is a publick scandal to the church; and therefore it has never been imagined that the one has repealed the other. *673*

That the spiritual court proceed only *pro salute animæ* of the offender, and the temporal punish him either in body or purse, is a distinction in words without a real difference; but in this case it is otherwise, where the ecclesiastical censure is for the criminal act, and the temporal penalty for a fraud. *ibid.*

Star-chamber. See **Court of King's Bench.**

Statutes. See **Books, Lasty, Register &c., Spiritual Court.**

The act of 8 *G. 2.* for the encouragement of the arts of designing, engraving, &c. by vesting the properties thereof in the inventors for 14 years, is not merely confined to works of invention only, but means the designing or engraving any thing that is already in nature. *93*

A print published of any building, house, or garden, falls within the act of parliament. *95*

The property of the prints vests absolutely in the engraver, though the day of publication is not mentioned. *P. 95*

It never was the intention of the act of the 10th of *Queen Anne*, for building, the fifty new churches, that there should be a suit in the ordinary courts of justice; the commissioners are the persons to determine any dispute. *144*

If the commissioners do any thing improper, the court of king's bench will grant a *mandamus*. *145*

The commissioners are by the act directed to account before the auditors of the treasury; and if there is any grievance, the relief is by applying to a court of revenue. *ibid.*

The several acts relating to this matter must be taken together. *146*

Nothing can issue by order of the treasurer, without a previous one from the commissioners. *147*

It is improper to make a person who acts ministerially only a sole party. *ibid.*

Where some of the undertakers under the act of 4 *Ann. c. 13.* in regard to briefs, are dead; in a bill for an account, their representatives need not be brought before the court, for they are each answerable, the one for the other. *162*

The enacting part of a statute extends further than the preamble in many instances, even in criminal matters. *205*

The 33 *H. 8. c. 23.* for trying treasons, &c. within the King's dominions, or *without*, has been extended to trials in the *West Indies*. *ibid.*

The court were unanimously of opinion that the statute of 7 & 8 *W. 3.* hath not operation to take away the ecclesiastical jurisdiction as to the husband clandestinely married. *671*

The statute of 7 & 8 *W. 3.* inflicts a penalty in respect of a clandestine marriage, being a fraud on the publick revenue; but the ecclesiastical censure is to punish it as an offence against the publick order of the church. *672*

Subsequent acts of parliament in the affirmative giving new penalties, do not repeal former methods of proceeding, ordained by preceding acts, without negative words. *675*

Statutes of Champarty.

Where a person undertakes to make out the title of another to an estate, and

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to have a part of the lands as a satisfaction for his trouble, though the agreement for this purpose is artfully drawn, in order to keep it out of the *Statutes of Champerty*, he will not be intitled to have a specific performance decreed here, but will be left to his remedy at law. Page 224

Statute of Fraudulent Devises. See *Party, Assets marshalled, Heir under Writters controverted between Heir and Executor, &c.*

A creditor brings a bill under the statute of fraudulent devises, against the assignee of the devisee only, the heir at law is a necessary party, and for want of his being before the court, the cause was ordered to stand over. 125

If an action at law is brought, it must be both against the devisee and heir at law, and equity follows the law in this respect. *ibid.*

The defect in 13 *Eliz. c. 5.* of fraudulent conveyances, is remedied by 3 *W. & M. c. 14.* 204

The action under the statute must be brought *jointly* against the heir and devisee. 433

The provision in the act was introduced for the benefit of the creditors merely, without any regard either to the heir or devisee; for otherwise there might have been a collusion between the devisee and heir at law, to play off the will or not, just as it should suit them best; therefore it was a wise provision of the act, to join the heir and devisee in the action, to secure the creditor at all events. *ibid.*

The reason why there are no precedents to be found of judgments at common law on this statute is, that the proceedings in this court are more expeditious; for as both heir and executor are before the court, the creditors may have a sale. *ibid.*

In the cases on this action in *Cliff's* and *Lilly's Cases*, the writ charges the heir in the *debt* and *detinet*, and that the judgment must follow the writ and count, is a known rule at law. *ibid.*

Statute of Frauds and Perjuries. See *Agreement, Lease, Will, Revocation of a Will, Parol Evidence.*

The statute requires that all declarations of trust should be in writing, otherwise they are absolutely void, except such as arise by construction of law. P. 71
He who pays the purchase money has a resulting trust, but then he must clearly prove the payment. *ibid.*

There is another way of taking a case out of the statute, which is by admitting parol evidence to shew the trust, from the mean circumstances of the pretended owner of the real estate, that makes it impossible for him to be the purchaser. *ibid.*

Nothing is a resulting trust under the statute of frauds and perjuries, but what are called so by operation of law. 150
Where a sum of money is given originally, and primarily out of land, a will with that charge must be equally executed with the same solemnity, because it is considered in this court as part of the land, since it can only be raised by sale or disposition of part. 272

Statute of Limitations. See *Limitations, Judgments, Possession, Merchants.*

A bill depending for six years in chancery, is not sufficient to take a debt out of the statute of limitations. 1

The appointment of a receiver, will not alter the possession of an estate in the person who shall be found intitled at the time the receiver was appointed, so as to prevent the statute of limitations running on during the right in dispute. 15

The statute of limitations may be pleaded to the debt, but not to the discovery when the debt was due. 51

L. gives *D. P.* an annuity for life, she dies in 1718, and in 1740 a bill is brought by her representative for the arrears of the annuity, from the year 1708, to the death of *D. P.* the court, from the length of time, presumed it to be paid, and dismissed the bill with costs. 71

Though the doctrine has prevailed, that the statute of limitations will not run as to a legacy, yet it will not hold as to an annuity. *ibid.*

Parties,

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Portions, which became due in 1673, were sued for in this court in 1717: Lord *Hardwicke* said, such a length of time creates a very strong presumption of their having been paid; and to induce the court to believe they are still unpaid, almost amounts to proving a negative. Page 178

Though an original be filed at law, yet if there has been no proceeding upon it for six years, it will not prevent the statute of limitations from running. 395

The creditor, by 4 *Anne*, has the same privilege on the debtor's being beyond sea, as he had by the statute of 21 *Jac.* on his being beyond the sea himself. 613

These statutes must be so considered, as if the clauses in the last had stood originally in the first. 614

Where a creditor who has been out of the kingdom returns, the time will run, and his going abroad again will give him no privilege; for that was gone by his having once returned after cause of action accrued. *ibid.*

If after an ouster of the rest, one tenant in common, or jointenant continues in possession of the whole for 20 years, it is a bar. 632

Statutes of Uniformity. See Parliament.

The pecuniary penalty enacted by the statute 13 *Car.* 2, in the case of teaching school without licence, is inflicted *ex nomine* for the punishment of the same offence, for which the spiritual judge inflicts excommunication. 672

By the statutes of 1 *Eliz.* and 13 & 14 *Ch.* 2. the laity are bound by the rubrick against marrying without publication of bans; and by the first act are expressly punishable by the censures of the church; and by the second act the power of the ordinary is directed to be continued and applied for punishing the like offence against the rubrick of the present book of common prayer. 673

Statute. See Securities.

Stocks. Vide South-Sea Stock.

The representative of Sir *T. C.* prays to redeem 2500 *l.* *East India* stock, transferred to the defendant the 1st of April 1708, for securing 2000 *l.* and interest at 6 *per cent.* to be re-transferred on payment of principal and interest the 2d of July following. Sir *T. C.* died in 1709; the son brought this bill in 1729. Lord *Hardwicke* refusing to decree a redemption dismissed the bill. Page 303

It is not necessary to bring a bill of foreclosure on a mortgage of stock. *ibid.* Whether the court of Chancery can touch stock, *Vide Taylor v. Jones*, 600, and note 2, 603

Subpoena. See Process, Infants, Will.

Surrender. See Copyhold.

A. C. devised all his lands, &c. to trustees till *R.* and *B.* attain 21, and in the mean time the rents to be applied towards their maintenance; and after they attained 21, then to *R.* and *B.* for their lives, and after their deaths, to the use of the heirs of *R.* and *B.* as tenants in common, and not as jointenants; part of the premises were copyhold, which were surrendered to the use of the will; *B.* one of the devisees attained 21, and by lease and release, conveyed his moiety in the freehold lands to his sister and her heirs, who married the plaintiff; and afterwards his copyhold lands in like manner, but made no surrender thereof; *Whatever words there may be in a will relative to copyhold lands, they can have no effect if there was no surrender, for nothing can pass a legal estate but what will pass it in law.* 304

Surbiboy. See also Jointenants.

Taxes.

A. devise of an annuity clear for *A.* means free from taxes. 376
Where a person had a power to make a jointure without any deduction for any charges imposed or to be imposed, parliamentary or otherwise; this does Y y 4 not

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not mean only such as are fixed and certain, but the land-tax, though a fluctuating one, is clearly within the power. Page 542

A bishop by covenanting to pay all taxes ordinary or extraordinary, does not subject himself to the land-tax, because he cannot bind his successors; otherwise in the case of a common person, because he can bind his heirs. 544

Tenants in Common. See Jointenants, Statute of Limitations.

Lord *Hardwicke* held, that the construction in *J. B.'s* will of the words, *as his sisters severally die*, is, that the sisters should take as tenants in common, and not as jointenants. 441

Tenant for life. See Interest.

Tenant for life of goods must sign an inventory to be deposited with the master. 81

Tenant by the Curtesy. See Curtesy, Redemption and Foreclosure, under Mortgage.

Tenant in Tail. See Estates in fee-tail. See Interest.

The statute of *Hen. 8. c. 28. s. 2.* gives a tenant in tail power only to make leases for 3 lives absolute, but not for 99 years determinable upon 3 lives. 40

Covenant for further assurance by tenant in tail. note 3, 101

Term for Years. See Estate for Years.

Term attendant on the Inheritance. See Estate.

Timber. See Parsonage.

Tithes.

A lessee of a rectory for three lives, who had made a derivative lease, brings a bill for tithes in kind, and to establish a custom of setting out corn in stacks: Lord *Hardwicke* held the bill properly brought, though the tithes are out in

lease, to prevent collusion between a lessee and occupiers. Page 136

Evidence of an exemption from tithes depends on usage, and a posterior one is evidence of the antecedent, where no other can be had. 137

Potatoes being sown in great quantities in a common field, the rector brought his bill for them as a great tithe. Lord *Hardwicke* held, that potatoes being in their nature a small tithe, the sowing them in greater quantities makes no alteration. 364

The distinction between great and small tithes might arise at first from the former producing greater, and the latter smaller quantities. 365

Though Lord Chief Justice *Holt*, in the case of *Wharton versus Lisle*, 3 *Lev.* 365. held tithes should be determined, whether great or small, from their quantity; the judgment was contrary. ibid.

If potatoes in gardens should be called small tithes, and great in fields, it must vary every year in every parish. ibid.

Where arable is turned into pasture, it is an agistment tithe, and becomes a small one from a great one. ibid.

Toleration.

The act of toleration was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the church of *England* who act contrary to the rules and discipline of the church, would introduce the utmost confusion. 501

Trade. See Merchants, Colliery.

The plaintiff moved for an injunction to restrain the defendant from using the *Megal* stamp on his cards, suggesting the same right to be in the plaintiff, having appropriated the stamp to himself, conformable to the charter granted to the card makers company by King *Charles the First*: Lord *Hardwicke* denied the injunction and said, *he knew no instance of restraining one trader from making use of the same mark with another.* 484

A clothworker may maintain an action against another of the same trade, for using

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using his mark, where it is done with a fraudulent design to put off bad cloths, or to draw away customers. P. 485

But the court will never establish a right of this kind, claimed under a charter only from the crown, unless there has been an action to try the right at law. *ibid.*

The objection of the defendant's taking away the plaintiff's customers, by using the same mark, is of no more weight, than there would be in an objection to one innkeeper setting up the same sign with another. 487

Trees. See **Timber.**

Trial. See **New Trial.**

Trust and Trustee. See **Executor, Rule, Restraint of Marriage, also when and how to be charged and discharged. See Personal Estate, Free Bench, Use, Witness, Implication, The Charitable Corporation, Baron and Feme.**

If a trustee, merely to have a point relative to his private interest determined, brings the *cestuy que trust* before the court, he shall pay the whole costs of the suit for such a vexatious behaviour. 48

There may be cases where the court will establish an agreement made with a trustee for an extraordinary allowance, beyond the terms of the trust. 60

The court always holds a strict hand over trustees with regard to extra allowances. *ibid.*

Where land is given to *A.* without the word heirs, and a trust declared of that estate, which can only be satisfied by *cestuy que trust's* taking an inheritance, the fee will pass to *A.* even without the word heirs. 72

Where there is a general trust of money for a society, a particular member cannot set off a private debt against a share he may be entitled to on a contingency. 84

Where a trustee of stock or annuities, takes upon him to transfer, it is a breach of trust. 121

Breach of trust can fall only on the personal estate of a trustee. 119

When an estate is purchased in the name of one person, and the money is paid by another, he has a resulting trust; or where it is declared only as to part, and nothing said as to the rest, what remains undisposed of, reverts to the heir at law. Page 150

Observations upon the last mentioned case. note 2. 150

In what cases trustees must take a fee by implication. note 4. 304

*If a husband, even after marriage, conveys his wife's fortune to a trustee for her separate use, and the trustee is guilty of a breach of trust, this court will oblige him to make satisfaction to the *cestuy que trust*. 243

It is not proper to direct an issue to try a trust, nor is there any instance of its being done; for where a case depends upon the statute of frauds and perjuries, it is incumbent upon this court to determine it, and therefore the bill must be dismissed as to any relief prayed. 364

A testator devising an estate to persons whom he names trustees, for such purposes as they or the major part of them shall think fit, gives no benefit to them, but is an authority only, by appointing a *quorum* out of the trustees. 568

The case of Lord *Glenorchy* and *Bosville*, has established a distinction of trusts *executed* and *executory*. 582

A trust is, where there is such a confidence between parties, that no action will lie, but is a case merely for the consideration of equity. 612

Where executors are made trustees, they can take nothing for their own benefit, unless it be particularly given to them: nor, as they have no ownership, can they alter the interest of the *cestuy que trusts*. 643

Trusts for raising Daughters' Portions, and Payment of Debts. See Portions and Provisions for Children, Satisfaction, Contingent Remainder.

W. L. gave *A. M.* a bond for 3000*l.* and interest, in 1728, and in 1731 paid her 100*l.* in 1736 he made his will, and gave all his lands in *B.* for a term of 200 years, upon trust to raise and pay, *within two years after his death, to A. M.* 200*l.* and also devised other lands to the same trustee for 300 years,

on trust to pay 200 l. to *A. M.* within one year after his death, the executor of *L.* paid some part of the bond to *A. M.* in her life-time; the bill prays, that the legacies may be decreed a satisfaction of the bond, and that her executor may refund what he has received in part payment thereof: *The Master of the Rolls* held this to be a contingent legacy; for if the legatee had died before the time of payment, it would have sunk in the land, and that the rule of ademption not extending so far as to take in a contingent legacy, this is not a satisfaction of the bond.

Page 300

There is no manner of difference between a direction to trustees to pay, and a gift; the testator is equally a donor in both cases.

301

One devises his lands in *D.* to *A.* his cousin, an infant, at 21, subject to the incumbrances thereon, and all his other lands to trustees, to pay debts; Sir *Joseph Jekyll* directed the mortgage on *A.*'s estate to be paid off, out of money arising by sale of the trust estate, though *A.* by bill had submitted to discharge it. On appeal to Lord Chancellor King, he affirmed the decree.

438

Trustees for preserving contingent Remainders.

A. seized in fee of several manors, lands, &c. by will devised the same to *W. S.* and others, their heirs and assigns, on trust out of the rents to pay his debts, and after payment thereof he devised the same estates to three of the trustees, their executors, &c. for 500 years, on trust to pay his legacies and 200 l. a year to his sister for life; and after the determination of the estate for years he devised the premises to all the trustees in trust as to one moiety, to the use of *T. B.* for life without impeachment of waste, and after the determination of that estate, to the trustees for life of *T. B.* to preserve contingent remainders, and after his decease then to the use of the heirs of the body of *T. B.* and for want of such issue, then to *Benjamin Bayshaw* in like manner as he had before devised the moiety to *T. B.* with the like remainders to other of his nephews, remainder to the testator's own right heirs. *T. B.* died without issue, and *Benjamin Bayshaw*, after suffering a recovery to

the use of his wife, devised fee, and died at law of *A. Bayshaw* had a recovery of remainder, and therefore was become tenant. *The Master* held some time to it was his wife's will of *A. Bayshaw*, and the title of the recovery was all the remainder.

Estates are to be construed by rules in law expressions interpreted by Lord Hardwicke. *B.* took on herself the estate as decreed an estate to be executed, and the trustees, upon it, a estate.

B. B.'s recovery not make a being before the fee decreed; an very defect.

Wasted Int Prohibition subsequent

SAMUEL I to trustees or on a purchase his wife to her natural interest and share a them, but day of marriage, one ed 22, but mother, so

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3000*l.* could not be made till after her death: the trustees laid out the greatest part of the money in the purchase of freehold and copyhold, and lent another part on bond; the court held this was a vested interest in *Constance*, and that *survivors* meant such as should be living at the death of the child before 21, and not such as were living at the death of the mother: And that the representative of *Constance* is intitled to a fourth of the bond, and a fourth in the whole in government securities, and which has not been invested in land. Page 123

Thomas Condon by his will gives to each of his two daughters *Isabella* and *Diana* 1000 *l.* to be raised and paid to them immediately after the decease of his wife, or out of the rents, &c. of his manors, &c. in *Yorkshire*, or by sale or mortgage with interest after the rate of 6*l. per cent.* from the decease of my wife until the said sums shall be duly paid to my daughters, or their respective executors, administrators or assigns; and in case either of his said daughters died before him, then the survivor, her executors, &c. was to receive all the sums before devised out of the said lands to be raised, and the part of the daughter so dying shall not cease or sink into the estate for the benefit of my heir, but shall remain and be raised for the benefit of my surviving daughter. 127

The testator died, and left one son and two daughters *Isabella* and *Diana*: after his death *Diana* married *Sir William Lowther*, and died in 1736. *Ann* the mother died in the year following; the husband brings the bill to have the sum of 1000 *l.* raised out of the estate charged; *Lord Hardwicke* was of opinion the 1000 *l.* ought to be raised. *ibid.*

He said, it has been determined where a legacy upon land depends on two contingencies, though one of them doth not happen, the legacy shall be raised. 123

Where the postponing the time of payment of a legacy has been owing to the circumstance of the testator's estate, and not to the circumstances of the legatees, that is not to strong a case for a legacy's sinking into the estate, as where the postponing the payment of it has ap-

peared to have arisen from circumstances on the part of the legatee. *P. 128*
An inference, his Lordship said, may be drawn in the plaintiff's favour, from the direction that the legacy shall be paid to the daughters, or their respective executors, administrators and assigns. *ibid.*

The clause on which *Lord Hardwicke* principally founded his opinion, was, the direction that if one daughter died before him, her part should not sink into the estate. 129

Upon the rehearing of this cause *Lord Hardwicke* said he had no doubt at the first hearing, and thought there was as little doubt for it here as in any case. 131

Had the father entred into a bond to pay 1000 *l.* to his daughter after his wife's death, it would have been forfeited if the executor had refused to pay. When no time of payment is fixed, a legacy in general is held to be paid immediately, unless the end for which it was given ceased. 133

The postponing of the payment here was only for the convenience of the estate, because the son would have been hurt if raised before his mother's jointure fell in. *ibid.*

Under marriage-articles 2000 *l.* part of 3000 *l.* vested in trustees, was amongst other trusts directed to be paid to such son as shall live to attain the age of 21, when and at such time as he shall have attained the age of 23; the eldest son attained his age of 21, but died before 23. *Lord Hardwicke* held, that the son became absolutely intitled to the money, and the time of payment only was postponed to the age of 23. 185

Wistoz and Wistozial Power.

Voluntary. See **Fraud, Implication.**

Use. See **Trust.**

Copyhold estates not within the statute of uses. note 2. 101

Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised though no other consideration appear. 149

Uses were introduced during the contests between the two houses of *York* and *Lancaster*

Leicester to avoid forfeitures, and were exactly the same with what traſts are now. *Page 150*

* A devise to *A.* and ſuch uſes as he ſhall appoint, was good before the ſtatute of uſes; for when he appoints, the *ceſſary que truſt* is in by the teſſor, and not by the appointer. *568*

The ſtatute of uſes has executed the legal eſtate, and joined it to the uſe: and the legal eſtate therefore muſt want to be executed by a conveyance to make it a truſt in equity. *583*

Uſury.

On a bill to ſet aſide an uſurious con- traſts a defendant may demur to the diſcovery of what intereſt he agreed to take, for that he cannot ſet this forth without diſcloſing the very intereſt he has taken. *393*

Ward. See Guardian, Marriage.

NO caſe calls more for the interpo- ſition of the legiſlature, than the marrying a ward without the leave of this court. *157*

The giving away a woman at her mar- riage, as the father, though not an eſ- ſential thing, yet is a ceremony al- ways required, and therefore Lord *Hardwicke* committed the perſon who did it. *158*

To make perſons liable to a contempt for ſuch a marriage, they muſt be con- cerned in the original contrivance, and be apprized of the infant's being a ward of the court. *ibid.*

The clergyman not appearing to be con- cerned in the deſign of doing this wrongful act, was not guilty of a con- tempt of the court. *159*

His Lordſhip ordered the licence to be left in the regiſter's hands, that re- courſe might be had to it if occaſion. *ibid.*

Waſte. See Timber, Infant.

It is not neceſſary to ſtay till waſte is ac- tually committed where the intention appears, and the defendant by his an- ſwer ſiſts on his right to do it. *183*

Though no proof appears of waſte, ye, if the tenant for life ſiſts on a right to do it, and it is proved that he has none, the owner of the reverſion may have an injunction. *Page 183*

A tenant for life though without impeach- ment of waſte, ſhall be obliged to keep tenants' houſes in repair, unleſs the charge is exceſſive, and ſhall not ſuffer them to run to ruin. *383.*

Will and Teſtament See *Eſtate, Charity and Charitable Uſes, Co- dicit, Coppyhold, Words, Expoſition of Words, Mortgage, Power, King, Statute of Frauds and Per- juries, Executors, Spiritual Court, Fraud, Decree, Annuity, Heir, Words.*

Though a feme covert has a power to diſpoſe of a ſum by a writing purport- ing to be a will, that does not give it the authority of one in the eccleſiaſti- cal court, but the huſband muſt be ex- amined to his conſent, before it can be proved. *49*

Where a probate differs from an original will, there muſt be an application to the ſpiritual court to amend. *50*

Where a will is to be eſtabliſhed, the teſ- tator muſt be proved to be of a ſound and diſpoſing mind, eſpecially where there are infants in the caſe. *56*

If a man leave 20 ſeveral papers behind him executed at different times, in re- ſpect to perſonal eſtate, they ſhall all be taken as one will, and ſo conſtrued, that all may answer the teſtator's in- tention. *87*

The court cannot declare a will well proved, where an heir at law is not to be found. *120*

A will is ambulatory till a teſtator's death, nor till then can money direcd- ed to be laid out in land be conſidered as land. *167*

A will executed firſt in the preſence of two witneſſes, afterwards the teſtatrix ſaid, this is my will, in the preſence of a third, but did not put her ſeal, nor did ſhe ſay, her name was of her own hand-writing. Lord *Hardwicke* gave no abſolute opinion, but was inclined to think, this was a void will, becauſe not exactly conformable to the cere- monies required by the ſtatute of *frauds* and

and perjuries, unless it had been resealed by the testatrix in the presence of the third witness, and unless she had declared it to be her hand-writing.

Page 176

Sealing her will without signing in the presence of this witness, he seemed to think would have been sufficient to make it a good will; but said it was a point proper to be determined at law. *ibid.*

A testator signed and executed his will in December 1735, in the presence of two witnesses; afterwards in the year 1739, he with his pen went over his name in the presence of a third witness, who subscribed his name in the testator's presence, and at his request; this was held by the court of king's bench in the case of *Jones and Lake*, February 1, 1742, to be a due execution of the will under the statute of frauds and perjuries, for there being the oath of three attesting witnesses, it is the degree of evidence required by the statute, and the same credit ought to be given to three persons at different times, as at the same time. See the note at the bottom of Page 176 and 177

A fraud in procuring a will cannot be determined here, but must be decided by a trial at law. 424

The intent of a testator in a will must be consistent with the rules of law, and in many cases his intent has been restrained; as where he has attempted a perpetuity, or to restrain a tenant in tail from alienation. 575

No person can take by a will, and at the same time do any thing that shall destroy the will. 629

Revocation of a Will. See **Statute of Frauds and Perjuries, &c.**

A demise of a lease for years to the same person to whom the fee is devised, and which commences in the life of the devisor, is no revocation of the fee. 72. 87

A. G. by his will devises to his nephew R. E. all his dividends on his *South-sea* annuities, and afterwards by a codicil gives his niece *Margaret Stone* 20*l.* a year for her life, to be paid out of his *South-sea* annuities. This is not a revocation *in toto*, but both devises may stand consistently together. 85

R. B. gives to *Elizabeth Brudenell* 800*l.* to be laid out for the advantage of herself during life, and afterwards to her children, and to M. L. 400*l.* to be laid out in the same manner, and to the same purpose as Mrs. *Brudenell's* and the remainder of his estate in N. and D. and all his freehold and personal estate whatsoever, after payment of debts, to his brother S. B. Page 268
By a second will, he gives to M. L. 100*l.* and to Mrs. *Brudenell* 400*l.* and the residue of his estate real and personal to S. B. *ibid.*

The first will was executed by the testator in the presence of three witnesses, and in every respect according to the statute of frauds and perjuries. *ibid.*

There were no witnesses to the second, but the whole was written with the testator's own hand. 269

In a letter directed to S. B. the testator recommends Mrs. *Brudenell* to his kindness, and gives to his godchild 200*l.* and if dead to Mrs. *Brudenell's* eldest son, which he desires only in case S. B. makes use of the last will. *ibid.*

Mrs. *Brudenell* brought a bill to have the legacies left to her raised out of the testator's real estate; the questions were, whether the legacies given under the first will were a charge upon the real estate, and whether revoked by the second? *ibid.*

Lord Hardwicke decreed only the lesser sums to be raised out of the real estate of the testator. 274

The smaller sums given here under the second will, are but a lessening of the quantum of the money given by the former, and are only new-modelled or qualified, and equally a charge on the real estate. *ibid.*

The rule is the same as to revocations of a devise of lands, and a revocation of a sum of money charged on lands, they must be revoked in the same manner. 273

Besides express revocations there are virtual ones, ever since the making of the statute; as by extinguishing or destroying the thing devised, and where that is done by the testator in his life-time, it must prevail. *ibid.*

Suppose a will is made according to form, and afterwards the lands sold by the testator which he had devised, though the form of revocation the statute of

frauds

frauds prescribed is not pursued, yet it is a virtual revocation. *Page 272*

A feoffment to the use of a testator and his heirs, is a revocation; if a man charges his lands with a debt, and afterwards pays that debt, it is extinct, though there is no formal revocation.

273

Lands charged with a portion by a will, and the same given by a testator in his life-time; this is a virtual revocation of the charge, though there is no actual one. *ibid.*

In all cases where a man gives a personal legacy charged on real estate, and the will is revoked, the legacies are gone; for where the land is meant only as a collateral security, if the thing secured be taken away, the security itself cannot subsist. *ibid.*

Where the same thing is given in a will to two different persons, Lord Coke said the latter words shall revoke the former; but in *Plowden*, in the case of *Paramore* and *Yardley*, it was held they shall take as joint-tenants; but Lord *Hardwicke* said, he rather inclined to Lord Coke's opinion. *374*

Where a man gives a horse to A. in the first part of a will, and in the latter end the same horse to B. it is a revocation: and *Swinburne* is mistaken in point of law, in saying they shall take as joint-tenants. *375*

A testator who had a leasehold estate devises it, and afterwards purchases the reversion in fee; this is a revocation of a will *pro tanto*, and the estate descends upon his heir at law. *425*

The rule of revocation of wills is the same in equity as at law. *598*

Though a feoffment be to the same uses with those in a precedent will, yet it is a revocation. *ibid.*

Devise, Devisee. See *Assets, Trust for raising Portions, Trustees and Payment of Debts under Trust and Heir under Writers controverted between the Heir, Executor and Devisee, Vested Interest, Exposition of Wills, Estate for Years.*

G. L. by her will gives the residue of her stock in trade in trust for the separate use of her daughter, and appoints her executrix, but makes no disposition of the surplus; this is not a legacy, but

an exception out of the stock; the executrix had given to her son, and not exclude the daughter from it plus.

A devisee for life of goods must make an inventory, to be deposited with the master for the benefit of all

A devise in express words is not excluded by subsequent general ones.

Money will not pass by a devise of goods and things of every kind, the devisee has a money legacy out of the will.

A devise cannot relate to a child who is not *in esse* till many years after a testator's death. *122. see*

A devise from a husband to a wife use of all household goods for her widowhood, intitles her to use any where, or even to let them hire.

J. R. by his will says, I give to my wife all my household goods, furniture, plate, linen and china in my house at E. wherein I now dwell, or said house belonging; and all said house, gardens, field and thereto belonging, so long as she continues my widow, and no longer. And I likewise give her my jetty coach, chariot and coach horses. The question was whether the words *so long as my wife continues a widow no longer*, are to be confined to the testator's house at E. or to be extended to the whole that was devised to her. Lord *Hardwicke* held that the household goods, furniture, plate, linen and china were put under the same restriction as the house itself; but that the jetty coach, chariot and coach horses, were the wife's absolute property.

The putting limiting words in the last part of a sentence makes no difference as to the construction.

A testator may give one thing to a person for life, together with an absolute property in another, unless the latter should be appurtenant to the former given.

A testator gives to *James Merson* all lands, tenements and messuages, however, after debts and legacies and funeral expences are discharged. The debts being charged only contingently on the real, if the personal should be deficient, the Master of

A Table of the Principal Matters.

held, the plaintiff has only an
for life.

Page 341

een held, where there has been a
of an estate to *A* at the begin-
and to *B*. at the end of a will,
shall take as joint tenants. 373
Nottingham first determined in fa-
of a *barres factus*, that personal
should be applied in exoneration,
then he was a *barres factus* of the
real estate.

436

versus *Pockley* was the first instance,
it was determined in favour of
issue of part of the estate only ;
Lord Nottingham's opinion has
followed ever since.

ibid.

ator devises all his estates to *A*.
has only leasehold, they will pass.

451

in hath lands in fee and for years,
deviseth all his lands, the fee-
pass only; and if he hath a lease
years, and no fee simple, the lease
years passeth; for otherwise the
would be void.

ibid.

at law directed on this issue, whe-
the testator had both freehold
leasehold; and in the same parish.

ibid.

See Evidence, Costs, De-
positions, Fraud, Infant, Colo-
Examination, &c.

els, if interested must produce a
se, before he can be an evidence.

15

aintiff examines only as to one
t, the defendant may cross exa-
to the same, but cannot make
of such witness to prove a differ-
fact.

44

ies of evidence in this court as to
esses, are exactly the same as at

48

a witness is dead, who attested a
, you must prove him to be so.

ibid.

an attesting witness has lived a-
d, a strict proof of his death is re-
ed; otherwise where he has lived
tantly in *England*, for in such a
the court will not expect a certifi-
of his funeral should be produ-

ibid.

a witness is under a necessity of
apating her own behaviour first,

no regard ought to be paid to her evi-
dence against the conduct of others.

Page 97

At law, where a person has granted and
conveyed, the very words *grant* and
convey imply a warranty on the part of
the grantor, and he cannot be examin-
ed as a witness to overturn and inva-
lidate the right and title granted by
the deed.

228

At law no defendant can be examined as
a witness; but in equity, a person
made a defendant for form sake, may
be examined in a cause, saving just
exceptions.

229

A trustee, though merely nominal can-
not be examined at law, but he clear-
ly may in equity.

ibid.

The Attorney General must enter a *nolle
prosequi* against a defendant, before he
can be admitted as a witness, even in
the case of the king.

ibid.

It is in particular instances only, where
fraud is charged by a bill, or in cases
of trust, that this court does not con-
fine itself within such strict rules as
they do at law, but in general, the
rules of evidence here and at law do
not differ.

ibid.

The satisfaction formerly for the non-
appearance of a witness was by action
only, but now the courts of law grant
an attachment against him.

593

The father of *H* the plaintiff in the origi-
nal cause, examined *H*. to the mer-
it; after his father's death, he brought
a bill of revivor, and became a party
interested; this does not disqualify
him from being an evidence.

615

Words. See Exposition of Words,
and Estates under Limitation of
Terms for Years, Deeds, Inten-
tion, Condition, Contingent Re-
mainder.

J. C. seised of several freehold lands, and
possessed of several leasehold, devised
to his wife, for life, all his estate in
London, and after her death, he be-
queathed the aforementioned estates to
his daughter *A. C.* and her heirs; and
to his wife gave all his goods, cattels
and chattels, and made her sole exe-
cutrix; she married again, and had
the plaintiff by her second husband,
who

who

A Table of the Principal Matters.

who insisted, that by the devise to his mother of the residue, the leasehold lands passed. Lord *Hardwicke* thinking it very material, whether all the freehold lands were comprized in the testator's marriage settlement, directed a trial at law to ascertain the fact. P. 450

Words that are doubtful, and afford implication only, are not to be attended to where the testator has expressed himself in legal words. 576

The words without impeachment of waste do not give a power inconsistent with an estate-tail, or at least will not defeat it. *ibid.*

Departing from strict words has produced such uncertainty, that it is to be wished they had been left to legal construction. 577

Where a testator's intent appears plain, this court will help an unapt expression, by making the words, *heirs of the body*, words of purchase. 580

Heirs of the body have at law been considered as words of purchase, even in a deed. *ibid.*

On the construction of *Serjeant Maynard's* will, the words *heirs of the body* were held to be in the sense of the first and every other son. 582

It is established, that in a will, the word *issue* is as strong as the word *heirs*. *ibid.*

Notwithstanding all the parties are volunteers under a will, it is not necessary the words must be taken as they are, but in many cases may be varied. *ibid.*

Writ. See *Process*, and *Ne Exeat Regno, Certiorari*.

The court will not, on motion, supersede a writ of replevin, unless there is a fraudulent use made of it. 237

After a writ has once issued here it is *de officio*, and this court has nothing further to do in it. *ibid.*

Writ of Scire Facias.

Upon a *Scire facias* taken out on a judgment; a defendant shall insist only on what he might have done at the hear-

ing of the original cause. Page 468
The rule in equity is the same, with this difference only, that if any thing new has happened since the hearing, the defendant may avail himself of it. *ibid.*

Younger Children. See Portion.

By articles on the marriage of the plaintiff's father and mother, her grandfather was to pay to a trustee 1000*l.* and to secure to him 300*l.* on bond, to be laid out in the purchase of *South-sea* annuities, in trust, after the death of the survivor of husband and wife, if they have a son, or one or more younger children, sons or daughters, to pay the principal sums to such younger children, if but one, and if more than one, equally to be divided between them; and *F. F.* the sister of the plaintiff's grandfather, by indentures of lease and release, dated the same day with the articles, conveyed two freehold houses to the use of herself for life, to the plaintiff's mother for life, then to her younger child or children in tail general, remainder to the mother in tail; the father and mother are dead, and left the plaintiff, their daughter and eldest child, and also a son; a bill was brought by the daughter, to have a maintenance out of the 1000*l.* and 300*l.* and the rents of the freehold houses, and to have both transferred to her when she comes of age; the question was, whether the plaintiff, as she is the eldest child of the marriage, can take. 456

Lord *Hardwicke* held, the plaintiff was intitled to the 1000*l.* and 300*l.* and the two freehold houses, under a trust in marriage articles; for an elder daughter, where there is a son, is accounted a younger child. *ibid.*

In an ejectment, the plaintiff could not have recovered; for being the eldest, she would not at law be construed a younger child; but in this court, as the articles are executory, they must be carried into execution, agreeable to the intention of the parties. 457







